(2)
Supreme Court, U.S.
FILED
No. 04 220 AUG 16 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LORI DENISE RHOADS,
Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORP., IN ITS CAPACITY AS RECEIVER FOR STANDARD FEDERAL SAVINGS BANK AND STANDARD FEDERAL SAVINGS ASSOCIATION AND RESOLUTION TRUST CORPORATION, A/K/A STANDARD FEDERAL SAVINGS & LOAN ASSOCIATION, AS RECEIVER
Respondents

On Petition for Writ of Certiorari
To The Fourth Circuit Court of Appeals

APPENDIX A TO THE PETITION FOR WRIT OF CERTIORARI

LORI DENISE RHOADS
Petitioner Pro Se
P.O. BOX 706
GERMANTOWN, MD 20875
(240) 418-2345

Appendix
Volume A

Table of Contents

1. Rhoads v. FDIC, et. al.
No. 03-2373 (4th Cir. April 16, 2004).....1

2. Rhoads v. FDIC, et. al.
No. CCB-94-1548 (D. Md. Sep. 30, 2003).....4

3. Rhoads v. FDIC, et. al.
2001 U.S. App. LEXIS 15588 (4th Cir.
Jul. 12, 2001).....25

4. Rhoads v. FDIC, et. al.
956 F. Supp. 1239 (D. Md. 1997).....66

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2373

LORI RHOADS,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as receiver for Standard Federal Savings Bank and Standard Federal Savings Association,

Defendant-Appellee,

and

RESOLUTION TRUST CORPORATION, a/k/a Standard Federal Savings & Loan Association, as Receiver,

Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (CA-94-1548-CCB)

Submitted: March 31, 2004 Decided: April 16, 2004
Before WIDNER, NIEMEYER, and KING, Circuit Judges.

Affirmed by

unpublished per curiam opinion.

Lori D. Rhoads, Appellant Pro Se. Ashley Doherty, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Lori D. Rhoads again appeals to this court following our reversal and remand, in part, so that she could pursue her claim that she was retaliated against in her employment in violation of the anti-retaliation provision of the Americans with Disabilities Act ("ADA"). See Rhoads v. FDIC, 257 F.3d 373 (4th Cir. 2001). On remand, Rhoads was awarded $120,006 in back pay from the jury. Nonetheless, Rhoads again appeals raising several issues. For the reasons that follow, we affirm.

Rhoads contests the district court's denial of her motion to reconsider under Fed. R. Civ. P. 60(b). As noted by the district court, the claims raised in Rhoads' Rule 60(b) motion are barred by the law of the case doctrine, United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999), as this court previously considered the claims in her prior appeal.

Rhoads' claim that she was entitled to recover compensatory and punitive damages in her trial for violation of the ADA's anti-retaliation provisions fails because such relief is unavailable. Kramer v. Banc of Am. Sec., 355 F.3d 961, 965 (7th Cir. 2004). Thus Rhoads'

claim that the district court erred in limiting her evidence to prove these damages also fails.

Next, Rhoads alleges that she was entitled to prejudgment interest on her award, attorney's fees, expenses, and costs. We have reviewed the record and arguments made by the parties on appeal and find no reversible error. Thus, we affirm for the reasons stated by the district court. See Rhoads v. FDIC, 286 F. Supp. 2d 532, 540-44 (D. Md. 2003).

Finally, Rhoads alleges numerous errors regarding this court's decision in her prior appeal. These issues are now the law of the case and may not be reasserted in her second appeal. Aramony, 166 F.3d at 661.

Accordingly, we affirm. We deny Rhoads' motion for oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORI D. RHOADS

v.

Civil Action No.
CCB-94-1548
Exempt From ECF

FEDERAL DEPOSIT
INSURANCE CORPORATION,
IN ITS CAPACITY AS
RECEIVER FOR STANDARD
FEDERAL SAVINGS BANK
AND STANDARD FEDERAL
SAVINGS ASSOCIATION

MEMORANDUM

The facts of this case have been recited in previous opinions, which are incorporated herein by reference. See Rhoads v. FDIC, 257 F.3d 373 (4th Cir. 2001); Rhoads v. FDIC, No. CCB-94-1548. 2002 WL 31755427 (D. Md. Nov. 7, 2002). Now pending before the court are the following post-trial motions: (1) motions by defendant Federal Deposit Insurance Corporation ("defendant" or "FDIC") for judgment as a matter of law after trial and to vacate verdict or for a new trial, and for a stay of enforcement of judgment; (2) motion by FDIC for judgment as a matter of law at the close of the evidence; (3) motions by plaintiff Lori D. Rhoads ("plaintiff" or "Rhoads") for attorney's fees, prejudgment interest, and costs; and (4) motion by Fred S. Sommer and Shulman, Rogers, Gandal, Pordy & Ecker (collectively "former counsel" or "movants") to intervene in

the present case.

I. Motions for judgment as a matter of law and to vacate verdict or for a new trial, and for a stay of enforcement of judgment

The gravamen of FDIC's motions for judgment as a matter of law after trial and to vacate verdict or for a new trial is that the court erroneously submitted the case to the jury. (Def.'s Mem. In Supp. Of Mot. For J. as a Matter of Law After Trial at 2-3.) The court ruled before the trial commenced that compensatory damagers were available to Rhoads on her Americans with Disabilities Act ("ADA") retaliation claim. See Rhoads, No. CCB-94-1548, 2002 WL 31755427, at *1-2. At the close of all the evidence at trial, however, the FDIC moved for judgment as a matter of law on the issue of compensatory damages on the grounds that Rhoads did not present any evidence whatsoever supporting her claim for such damages. (See Def.'s Mem. In Supp. Of Mot. For J. as a Matter of Law at the Close of the Evidence at 5-7.) The court agreed with the FDIC and, hence, granted its motion on this basis. n1

----------Footnotes----------

n1 The FDIC also moved for judgment as a matter of law at the close of the evidence on the grounds that the plaintiff failed to introduce substantial evidence establishing a causal link between the adverse employment action and the protected activity, and that there is no substantial evidence supporting the plaintiff's retaliation claim. (Def. Mem. In Supp. Of Mot. For J. as a Matter of Law at the Close of the Evidence at 1-5.) The court reserved rulings on these two arguments; they will be resolved in this Memorandum and Order.

----------End Footnotes----------

The jury subsequently found that Rhoads proved "by a preponderance of the evidence that the reasons given by the FDIC for her termination were false and the retaliation for her protected conduct under the ADA was the true reason for that termination" and awarded her $120,006 in back pay. (Verdict Form.) The defendant contends that the court should have withdrawn the case from the jury because the only relief available to the plaintiff, given the court's ruling, was back pay, an equitable remedy. (Def.'s Mem. In Supp. Of Mot. For J. as a Matter of Law After Trial at 2-3.) For the reasons that follow, the court will deny the defendant's motions for judgment as a matter of law after trial and to vacate verdict or for a new trial.

The court first notes that, in light of a recent Supreme Court opinion, it is not entirely clear whether back pay is a legal or equitable remedy. Although courts in this circuit commonly have regarded back pay in Title VII or ADA suits as an equitable remedy, see, e.g., Ford v. Rigidply Rafters, Inc., 984 F. Supp. 386, 392 (D. Md. 1997), the Supreme Court of the United States recently reasoned that:

Congress "treated [backpay] as equitable" in Title VII [opinion of GINSBURG, J.], only in the narrow sense that it allowed backpay to be awarded together with equitable relief:

"[T]he court may. . . order such affirmative action as may be appropriate, which may include, but is not limited to, *reinstatement or hiring of employees, with or without back pay*. . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1) (1994 ed.) (emphasis added).

If the referent of "other equitable relief" were "back pay,"

it could be said, in a sense relevant here, that Congress "treated" back pay as equitable relief. In fact, however, the referent is "reinstatement or hiring of employees,' which is modified by the phrase "with or without back pay."

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 218 n.4 (2002). n2 Lower courts have understood that Great-West Life "denied that back pay is a form of equitable relief, stating instead that back pay may be 'made part of an equitable remedy' that includes the hiring or reinstatement of employees, but is not an equitable remedy in itself." Kishter v. Principal Life Ins. Co., 186 F. Supp. 2d 438, 445 (S.D.N.Y. 2002) (quoting Great-West Life, 534 U. S. at 218 n.4). The Court's statements in Great-West Life are admittedly dicta, and the Fourth Circuit has not yet assessed their import. Nevertheless, if back pay under Title VII is properly considered a legal remedy, Rhoads was guaranteed a right to trial by jury, defeating the defendant's motions.

----------Footnotes----------

n2 The ADA borrows remedies from Title VII for retaliation claims in the employment context. See 42 U.S. C. §§ 12203, 12117, 2000e-5. The Court's discussion of back pay in Title VII actions pursuant to 42 U.S.C. § 2000e-5(g) (1), then, is directly applicable to this case.

----------End Footnotes----------

Even if back pay is rightly regarded as an equitable remedy, the court holds that the FDIC impliedly consented to have the jury decide the issue of back pay. In Title VII and ADA cases where numerous types of monetary relief are sought, juries frequently determine back pay awards. See, e.g., Bryant v. Aiken Reg'l Med.

Ctrs., Inc., 333 F.3d 536, 540 (4th Cir. 2003). In the instant case, Rhoads specifically sought a jury trial on "all counts." (Compl. at 22.) Although the FDIC asserted that Rhoads was not entitled to a jury trial at all (see Def.'s Mem. In Supp. Of Mot. For Summ. J. and to Strike Pl.'s Jury Demand at 15-16), it never specifically objected to having the jury decide the issue of back pay; in other words, after the court ruled that compensatory damages were available to Rhoads and that she had a right to a jury trial, the defendant did not object to having the jury decide the issue of back pay. Indeed, the defendant proposed a jury instruction on the issue of back pay, strongly evidencing its expectation that the jury would decide the issue. (See Def.'s Proposed Jury Instructions at 14) ("If you decide to award the Plaintiff damages, you may award back pay based on the evidence introduced at trial, to compensate the Plaintiff justly and fairly for a financial loss as a result of her termination."). In light of the foregoing, the court holds that the FDIC impliedly consented to have the jury decide the issue of back pay. n3 Cf. Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 501 (7th Cir. 2000) (holding, in an ADA case, that a party's failure to object to the opponent's jury demand as to all issues amounted to implied consent to have the jury award back pay); Nissim v. McNeil Consumer Prods. Co., 957 F. Supp. 600, 602 n.5 (E.D. Pa. 1997) (concluding that "both parties. . . Consented to the submission of the back pay award to the jury" because "plaintiff's own proposed jury instructions included directions for determining the amount of back pay damages"); Knight v. Georgetown Univ., 725 A.2d 472, 483-85 (D.C. 1999) (suggesting without deciding that a part which proposed jury instructions on the issue of promissory estoppel and waited until the end of all the evidence to move for a court ruling effectively waived any right it may have had to a decision by the bench).

----------Footnotes----------

n3 Troy v. City of Hampton, 756 F.2d 1000 (4th Cir. 1985), which held that conducting a jury trial in a Veterans Reemployment Rights Act case was reversible error, is distinguishable in that "the clear intent of Congress [was] that suits under [that statute] should be handled nonjury." Id. At 1003. Cases such as Bryant that uphold jury awards of back pay show that there is no such clear intent with respect to suits under Title VII and the ADA.

----------End Footnotes----------

Given that the issue was properly presented to the jury, the court declines to disturb the jury's verdict and back pay award. As the Fourth Circuit recently explained:

Under Fed. R. Civ. P. 50(b), the question is whether a jury, viewing the evidence in the light most favorable to the [prevailing party], could have properly reached the conclusion reached by this jury. If reasonable minds could differ about the result in this case, [the court] must affirm the jury's verdict.

Bryant, 333 F.3d at 543 (internal quotations and citations omtted); see also Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 331 (4th Cir. 2003) ("We view the evidence. . . in the light most favorable to . . . the nonmovant, drawing all reasonable inferences in her favor without weighing the evidence or assessing the witnesses' credibility. Judgment as a matter of law is proper only if there can be but one reasonable conclusion as to the verdict.") (internal quotations and citation omitted). That demanding standard is not met here because sufficient evidence supported the jury's conclusions. n4

----------Footnotes----------

n4 Similarly, the FDIC does not meet the standard for new trial under Federal Rule of Civil Procedure 59, which permits the court to "grant a new trial only if 1) the verdict is against the clear weight of the evidence, 2) is based on evidence which is false, or 3) will result in a miscarriage of justice." Bryant, 333 F.3d at 543 (internal quotations omitted).

----------End Footnotes----------

Of the many facts presented by Rhoads at trial, the following are the most significant: (1) Rhoads consulted with an attorney in order to determine whether she had legal recourse against her former employer for violations of its smoke-free work environment policies; (2) on or about August 18, 1993, Rhoads informed supervisors, including W. Marshall Jones, that she had consulted with an attorney; (3) Jones purportedly responded that Rhoads would regret her decision to meet with a lawyer; (4) Rhoads's employment was terminated on or about September 15, 1993; (5) Jones played some part in the decision to terminate Rhoads; (6) soon after Rhoads and her attorney began corresponding with her former employer, phrasing her complaints in legal terms, she was fired; and (7) although company policy allowed termination after ten or more days of unexcused absence, her former supervisors initiated termination proceedings before she accumulated ten such absences.

To succeed on an ADA retaliation claim, a plaintiff "must either offer sufficient direct and indirect evidence of retaliation, or proceed under a burden-shifting method." Rhoads, 257 F.3d at 391. Under the latter approach, the plaintiff must first show that: "(1) she engaged in a protected activity; (2) her employer acted adversely

against her; and (3) her protected activity was causally connected to her employer's adverse action." Id. at 392. The employer "then has the burden to rebut the presumption of retaliation by articulating a legitimate, nonretaliatory reason for its actions. If the employer does so, the plaintiff must demonstrate that the proffered reason is a pre-text for forbidden retaliation." Id. (internal quotations and citations omitted); see also Bryant, 333 F.3d at 543 ("It is then up to the jury to decide whether the adverse action was actually taken for the proffered reason, or if it was intended as a retaliatory measure.") The plaintiff retains at all times the ultimate burden of persuading the trier of fact that she was the victim of retaliation. Rhoads, 257 F.3d at 392.

The evidence conclusively established that Rhoads engaged in a protected activity, namely, consulting an attorney to determine her legal rights in connection with the violation of smoke-free work environment policies, and that her former employer acted adversely against her when it terminated her employment. The critical inquiry for the jury, then, was whether Rhoads carried her ultimate burden and proved by a preponderance of the evidence that her protected activity was causally connected to her former employer's adverse action. Based solely on the record at trial, the court concludes that Rhoads presented sufficient evidence from which a reasonable jury could conclude that Rhoads met her burden. The direct evidence of retaliation, coupled with the circumstantial evidence (especially the closeness in time between Rhoads's announcement that she spoke with a lawyer and her termination, and the testimony that Rhoads's former employer initiated termination proceedings and drafted the notice of termination before the expiration of the requisite ten days), supports the jury's conclusion that Rhoads's termination was intended as a retaliatory measure. Because there was a legally

sufficient evidentiary basis for the jury's verdict, the defendant's motions for judgment as a matter of law after trial and to vacate verdict or for a new trial will be denied. For the same reason, the court will also deny the remaining two arguments from the defendant's motion for judgment as a matter of law at the close of the evidence (see supra note 1).

Finally, the FDIC moves the court to stay enforcement of the money judgment against it pending its appeal to the Fourth Circuit. Pursuant to Rules 62(d) and (e) of the Federal Rules of Civil Procedure, the FDIC is entitled to a stay of enforcement of the money judgment, and no bond is required of the United States when it seeks a stay pending appeal. Fed. R. Civ. P. 62(d)-(e); see also In re Trans World Airlines, Inc., 18 F.3d 208, 211-12, 215 (3rd Cir. 1994). Accordingly, the defendant's motion for a stay of enforcement of judgment will be granted.

II. Motions for attorney's fees, prejudgment interest, and costs

Former counsel represented Rhoads through her first trial; n5 they withdrew their representation in 1998 because Rhoads apparently was delinquent in her payment of attorney's fees. (See, e.g., Mem. In Supp. Of Mot. to Intervene at 4.) Rhoads proceeded pro se at her appeal before the Fourth Circuit, n6 which reversed the district court's summary judgment for the defendant on her ADA retaliation claim, and at her second trial, where the jury found for Rhoads on the ADA retaliation claim and awarded her $120,006 in back pay. (Id. at 4, 6).

----------Footnotes----------

n5 Sommer represented Rhoads through his solo practice until June 1998; he continued his representation of

Rhoads when he became a shareholder of Shulman, Rogers, Gandal, Pordy & Ecker at that time. (Mem. In Supp. Of Mot. to Intervene at n.1.)

n6 The Georgetown Appellate Litigation Program wrote an amicus curiae brief on behalf of Rhoads, and the supervising attorney of the Program participated at the oral argument before the Fourth Circuit. See Rhoads, 257 F.3d at 376. In a brief submitted to the Circuit Court for Montgomery County, however, Rhoads insisted that she alone "argued to the [Fourth Circuit] that the employer's rush to terminate was prima facie evidence of retaliation." (See Def.'s Opp. to Pl.'s Request for Att'y's Fees Ex. B at 4 n.3.) Rhoads specifically denied that amicus was responsible for obtaining reversal by the Fourth Circuit; in fact, Rhoads accused amicus of fraud. (Id. Ex. B at 5 n.4.)

----------End Footnotes----------

In March 1998, Rhoads filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Virginia. (Def. Opp. to Mot. to Intervene Ex. A.) Rhoads listed former counsel as a creditor holding an unsecured nonpriority claim in the amount of $190,000 for legal services. (Id. Ex. A at Schedule F.) Rhoads also disclosed on her petition's statement of financial affairs that she was a party to the instant litigation, described as a "[c]ivil claim for damages." (Id. Ex. A at Statement of Financial Affairs.) Former counsel was served with Rhoads's petition, and on July 2, 1998, the bankruptcy court granted a discharge under 11 U.S.C. § 727. (Id. Ex. A-B.) Nevertheless, on September 28, 1998, former counsel sent a "Notice of Attorney's Lien" to counsel for the FDIC, stating that, pursuant to "Maryland Code, Business and Professions Article, § 10-501 and Maryland Rule of Civil Procedure 2-

652," they had "a lien on any judgment, award, or settlement" Rhoads may receive in connection with the instant litigation "in the amount of no less than (i) $159,729.74 or (ii) the amount of any attorney's fees awarded for legal services provided by the undersigned prior to August 28, 1998." (Mem. In Supp. Of Mot. to Intervene Ex. B.)

On August 8, 2001, Rhoads, proceeding pro se, sued former counsel in the Circuit Court for Montgomery County alleging legal malpractice. (Def. Opp. to Pl.'s Request for Att'y 's Fees Ex. A.) In her complaint, Rhoads discusses the attorney's lien filed against her by former counsel (id. Ex. A at ¶ 34) and prays the court for a judgment that includes "[r]ecovery of fees paid to [former counsel] and dismissal of [their] lien." (Id. Ex. A at 14.)

In her motion before this court, Rhoads seeks attorney's fees based on her own pro se representation and former counsel's representation. She also seeks litigation expenses. (Pl.'s Mem. In Supp. Of Att'y's Fees at 2-5.) As Rhoads herself admits, pro se litigants are not entitled to attorney's fees authorized by a fee-shifting statute. (Id. at 2); see also Bond v. Blum, 317 F.3d 385, 398-99 (4th Cir. 2003). Plaintiff's motion seeking fees related to her own pro se representation, therefore, will be denied.

As for the representation by Rhoads's former counsel, a prevailing plaintiff in an ADA action is generally entitled to recover fees paid to an attorney unless special circumstances render such an award unjust. Mammano v. Pittston Co., 792 F.2d 1242, 1244 (4th Cir. 1986); see also 42 U.S.C. § 12205. The first determination to be made by the district court is whether the plaintiff is a prevailing party. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The second determination is whether an award of attorney's fees should be granted to the prevailing party

and what amount would be reasonable under the specific circumstances of the case; the district court has significant discretion in determining the amount of a statutory fee award. Id. at 433, 437. It is important to be mindful of the purpose of fee-shifting statutes: "'to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.'" Bond, 317 F.3d at 399 (quoting Kay v. Ehrler, 499 U.S. 432, 436 (1991)).

There seems to be no dispute that Rhoads is a prevailing party within the meaning of 42 U.S.C. § 12205. The determination to be made by the court, then, is whether an award of attorney's fees should be granted to Rhoads for her former counsel's work in the case.n7 Importantly, any entitlement to attorney's fees belongs to Rhoads alone. See, e.g., Brown v. Gen. Motors Corp., 722 F.2d 1009, 1011 (2d Cir. 1983) ("[I]t is the prevailing party rather than the lawyer who is entitled to attorney's fees."). As stated by the court in Brown, the "entitlement of an attorney to fees depends upon the contractual arrangement between the attorney and the client. The parties to these arrangements may well take into account the possibility of a court award of fees where statutory authority. . . exists but a claim for such an award itself be made by the party rather than the attorney." Id.n8 The court is aware of no contractual arrangement between Rhoads and her former counsel whereby Rhoads assigned or otherwised negotiated her entitlement to statutory attorney's fees to her former counsel.n9 Accordingly, any entitlement to attorney's fees belongs to Rhoads alone as the prevailing party.

----------Footnotes----------

n7 Although the court holds that Rhoads is not entitled to any fees for her former counsel's services in this case, it should be noted that, even if she were entitled to fees

generally, the amount would be very small. First, the prevailing party is not entitled to fees incurred in pursuing unsuccessful claims. See e.g., Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). Of the approximately ten original claims, only one was ultimately successful. In addition, because former counsel withdrew their representation before Rhoads prevailed at the Fourth Circuit and second trial, they would need to establish that their efforts, and not those of Rhoads or amicus, produced the final judgment in favor of Rhoads. Former counsel excerpted only one paragraph from an opposition brief they drafted on Rhoads's behalf and one paragraph from the Fourth Circuit's opinion in an effort to establish this causal link. (See Mem. In Supp. Of Mot. to Intervene at 4-5 & n. 3.) The court assumes, without deciding, that the movants did not establish this link on the present record.

n8 According to former counsel, they have standing to assert a direct claim for attorney's fees because Rhoads requested fees "on [their] behalf." (Mem. In Supp. Of Mot. to Intervene at 8 (internal quotations and citations omitted); see also id. Ex. D.) The court doubts former counsel have standing, see e.g., Bandera v. City of Quincy, 220 F. Supp. 2d 26, 43-45 (D. Mass. 2002); although Rhoads seeks attorney's fees representing her former counsel's work, she does not state that her former lawyers are entitled to those fees. The court also notes that Rhoads declined her former counsel's invitation to assist her in connection with her motion for attorney's fees. (Mem. In Supp. Of Mot. to Intervene at 6 n.4, Ex. D.)

n 9 Rhoads and her former counsel have mentioned that their fee arrangement provides for a "guaranteed fee" and a "contingent premium;" they do not state, however, that their fee arrangement addresses entitlements to statutory attorney's fees. (See, e.g., Mem. In Supp. Of Mot. to

Intervene at 3 n.2.)

----------End Footnotes----------

In a case involving a statutory fee award to withdrawn counsel, the Fourth Circuit stated that the "issue, simply, is whether services were performed which contributed to claimant's success in the lawsuit." Mammano, 792 F.2d at 1245. Although former counsel vehemently dispute her contentions, Rhoads has repeatedly asserted, in court documents, that she alone raised the argument upon which the Fourth Circuit reversed the district court's summary judgment on her ADA retaliation claim (see, e. g., Def.'s Opp. to Pl.'s Request for Att'y's Fees Ex. B at 4-5; id. Ex. A ¶ 39), and representations made in the course of litigation are binding on the parties that make them, see, e.g., Hagan v. McNallen (In re: McNallen), 62 F.3d 619, 625 (4th Cir. 1995); Major v. CSX Transp., Inc., 170 F. Supp. 2d 563, 567 (D. Md. 2001). Because any entitlement to attorney's fees belongs to Rhoads alone, and given her own statements that former counsel performed no services which contributed to the ultimate success of the litigation, Rhoads is not entitled to receive attorney's fees for any work performed by her former counsel. See Ward v. Tipton County Sheriff Dep't, 937 F. Supp. 791, 801 (S.D. Ind. 1996) (denying attorney's fees under Title VII for the work of the prevailing party's former counsel when there was no evidence that former counsel were responsible for the litigation's success or that the prevailing party was obligated to pay fees to them)

Even if the court were to disregard Rhoads's contentions that her former counsel did nothing to contribute to the suit's ultimate success, it cannot ignore the myriad statements she has made in court documents regarding her former counsel's competence. (See, e.g., Def.'s Opp. to

Pl.'s Request for Att'y's Fees Ex. A ¶¶ 14-40; id. Ex. B at 2-6.) In determining an award of attorney's fees, the district court must consider the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), many of which bear on the issue of counsel's competence and performance in the lawsuit. See id. (identifying factors such as the ability of the attorneys and the skill requisite to perform the legal services properly). Although the court takes no position whatsoever on the merits of Rhoads's allegations, given her admissions that her former counsel were negligent in the litigation of her case, the court has no choice but to value their work at zero for purposes of this motion. Cf. Hagan, 62 F.3d at 625 (refusing to consider issues that a party's trial counsel "conceded" before the lower court); Major, 170 F. Supp. 2d at 567 (treating statements in a party's interrogatory answers as "a legal conslusion in the nature of a stipulation excusing the need to produce evidence"). Mindful that the purpose of awarding attorney's fees is to enable plaintiffs to retain "competent counsel," the court simply cannot order the defendant to pay for the fees of former counsel whom the prevailing party herself has repeatedly characterized as incompetent.

Finally, the court notes that, although an award of attorney's fees may be the norm, no fees should be awarded if it would be unjust. Mammano, 792 F.2d at 1244. If Rhoads's malpractice suit against former counsel is successful, she will be eligible to recoup all of the attorney's fees she paid to them. It could be a windfall, then, to award her attorney's fees when she is simultaneously pursuing a judgment for attorney's fees in another forum. In addition, while the court in no way renders any opinion regarding the effect of the bankruptcy court's discharge on the former counsel's attorney's lien, Rhoads herself has proffered that she

owes nothing to her former counsel as a result of the discharge. (See, e.g., Def.'s Opp. to Pl.'s Request for Att'y's Fees Ex. B at 4; Pl.'s Reply to Def.'s Opp. for Att'y's Fees at 2.) If that is the case, it would be manifestly unjust to award her attorney's fees to cover expenses that already have been discharged. For all of the foregoing reasons, Rhoads's motion for attorney's fees for the work of her former counsel will be denied.

Rhoads also seeks litigation expenses incurred during the course of her own pro se representation and her former counsel's representation. (Pl.'s Mem. In Supp. Of Attorney's Fees at 4-5.) Litigation expenses pursuant to fee-shifting statutes, distinct from costs recoverable under 28 U.S.C. § 1920, cover out-of-pocket expenses incurred by attorneys in the course of providing legal services, such as copying costs and travel expenses. See, e.g., Brown v. Gray, 227 F.3d 1278, 1297-98 (10th Cir. 2000); Daly v. Hill, 790 F.2d 1071, 1084 n.18 (4th Cir. 1986). Since pro se litigants are not entitled to fee awards authorized by fee-shifting statutes, Bond, 317 F.3d at 398-99, they also cannot recover attorney litigation expenses. See, e.g., Clarke v. Parkinson, 225 F. Supp. 2d 345, 355 (S.D.N.Y. 2002) ("Where an individual litigant elects to undertake legal research, or factual research, or other case-related tasks, even in order to save counsel fees, the litigant whould not expect to have the costs of his or her efforts included in any determination of litigation expenses."). In addition, given the court's earlier holding that Rhoads is not entitled to attorney's fees for her former counsel's work, she is similarly not entitled to litigation expenses incurred by them. Rhoads's motion for litigation expenses, therefore, will be denied. n10

----------Footnotes----------

n10 Her Bill of Costs, opposed by the FDIC, will be dealt

with at the appropriate time by the Clerk of the Court. If necessary, I will resolve any remaining disputes. See, e. g., Schmitz-Werke GmbH Co. v. Rockland Indus., Inc., 271 F. Supp. 2d. 734, 735 (D. Md. 2003).

----------End Footnotes----------

Finally, Rhoads seeks prejudgment interest on her back pay award. In support of her motion, Rhoads submits that the "sue and be sued" language in the FDIC's enabling legislation defeats the defendant's assertion of sovereign immunity. (See, e.g., Pl.'s Mem. In Supp. Of Prejudgment Interest at 2-3.) As recently stated by the Fourth Circuit, however, a "waiver of sovereign immunity does not permit an award of interest against the government unless that waiver expressly extends to interest." G ex rel. Ssgt RG v. Fort Bragg Dependent Schs., 324 F.3d 240, 256 (4th Cir. 2003); see also Lane v. Pena, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.") (internal citations omitted). Because there is no specific waiver of the FDIC's sovereign immunity extending to interest awards, see Battista v. FDIC, 195 F.3d 113, 1120 (9th Cir. 1999), the court will deny Rhoads's motion for prejudgment interest.

III. Motion to intervene

Rhoads's former counsel move to intervene in the present action, asserting two interests in the lawsuit: (1) "an interest in any attorney's fee awarded to Rhoads for [former counsel's] work"; and (2) "an interest in any final judgment entered by this Court, by virtue of the Attorney's Lien." (Mem. In Supp. Of Mot. to Intervene at

7-8.) Given the court's ruling that Rhoads is not entitled to any statutory attorney's fees for her former counsel's work, the movants' first proffered interest is moot. Cf. Bandera v. City of Quincy, 220 F. Supp. 2d 26, 43-45 (D. Mass. 2002) (holding that a former attorney did not have a direct interest in statutory attorney's fees in a Title VII action).

Regarding the second purported interest, the attorney's lien, the court further notes that such an interest appears very much in dispute. The plain language of section 10-501 of the Maryland Code, Business Occupations and Professions Article, reveals that a lien attaches "only if, and to the extent . . . That the client owes the attorney . . . compensation for legal services *that produced the settlement, judgment, or award.*" Md. Code Ann., Bus. Occ. & Prof., § 10-501 (2003) (emphasis added). In other words, the movants apparently must demonstrate that their services produced the money judgment in order for the lien to attach; as discussed, Rhoads disputes that the former counsel's work contributed to the litigation's success. Further, the former counsel seemingly also must establish that the bankruptcy court's discharge did not extinguish their lien. Given the uncertainties surrounding the former counsel's attorney's lien, the court will not permit intervention on this basis. Finally, it is unlikely that this court has jurisdiction over an action to execute under an attorney's lien. See Md. Code Ann., Bus. Occ. & Prof., § 10-501(d); Md. R. Civ. P. 2-652(c) (2003) (stating that an attorney may bring an action for execution under an attorney's lien only in a Maryland circuit court); Vangrack, Axelson & Williamowsky, P.C. v. Estate of Abbasi, 261 F. Supp. 2d 352, 362-63 (D. Md. 2003). To the extent that such an action must proceed in a Maryland circuit court (and, indeed, such an action between Rhoads and her former counsel is currently pending in the Circuit Court for Montgomery County), the

court's disposition of the instant motions cannot impair or impede any interest former counsel may have by way of their attorney's lien. The former counsel's motion to intervene, thus, will be denied.

A separate Order follows.

Sept. 30, 2003
Date

"s/Catherine C. Blake"
Catherine C. Blake
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORI D. RHOADS

v.

Civil Action No.
CCB-94-1548
Exempt From ECF

FEDERAL DEPOSIT
INSURANCE CORPORATION,
IN ITS CAPACITY AS
RECEIVER FOR STANDARD
FEDERAL SAVINGS BANK
AND STANDARD FEDERAL
SAVINGS ASSOCIATION

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. defendant FDIC's motion for judgment as a matter of law at the close of the evidence (Docket No. 172) is **DENIED**;

2. defendant FDIC's motion for judgment as a matter of law after trial and to vacate verdict or for a new trial (Docket No. 173) is **DENIED**;

3. defendant FDIC's motion for stay of enforcement of judgment (Docket No. 174) is **GRANTED**;

4. plaintiff Rhoads's motion for prejudgment interest

(Docket No. 177) is **DENIED**;

5. plaintiff Rhoads's motion for attorney's fees (Docket No. 178) is **DENIED**;

6. movants Fred S. Sommer's and Shulman, Rogers, Gandal, Pordy & Ecker's motion to intervene (Docket No. 190) is **DENIED**; and

7. copies of this Order and the accompanying Memorandum shall be sent to Ms. Rhoads and counsel of record, including counsel for the proposed intervenors.

_____ _____

Date

Catherine C. Blake
United States District Judge

LORI RHOADS, Plaintiff-Appellant, v. FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as receiver for Standard Federal Savings Bank and Standard Federal Savings Association, Defendant-Appellee. GEORGETOWN APPELLATE LITIGATION CLINIC, Amicus Curiae.

No. 98-2374

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2001 U.S. App. LEXIS 15588

October 30, 2000, Argued

July 12, 2001, Decided

NOTICE:
RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black Jr., Senior District Judge. (CA-94-1548-B).

DISPOSITION:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

COUNSEL:
ARGUED: Adam Nathan Steinman, Supervising Attorney, Appellate Litigation Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Amicus Curiae.

Robert Parker Fletcher, NIXON PEABODY, L.L.P., Washington, D.C., for Appellee.

ON BRIEF: Lori Denise Rhoads, Appellant Pro Se. Leslie Paul Machado, NIXON PEABODY, L.L.P., Washington, D.C.; Kathryn R. Norcross, J. Scott Watson, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C., for Appellee.

Steven H. Goldblatt, Director, Richard D. Watkins, Student Counsel, Appellate Litigation Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Amicus Curiae.

JUDGES:
Before WILKINS and KING, Circuit Judges, and Frank J. MAGILL, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Judge King wrote the opinion, in which Judge Wilkins and Senior Judge Magill joined.

OPINION BY:
KING

OPINION:
KING, Circuit Judge:

Lori Denise Rhoads appeals from the judgment rendered against her on her claims under the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 ("FMLA"); the employment provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117, 12203 ("ADA"); and Maryland state law. The district court granted summary judgment to the Federal Deposit Insurance Corporation ("FDIC"), in its capacity as representative of Rhoads's former employers, on her ADA claims -- for failure to make reasonable accommodations, discriminatory termination, and retaliation -- as well as the state law claims. See Rhoads v. FDIC, 956 F. Supp. 1239 (D. Md. 1997). A jury subsequently found in the FDIC's favor on the FMLA claim, see Order of Judgment, No. B-94-1548 (D. Md. Mar. 4, 1998), and the court denied Rhoads's motion for judgment as a matter of law or, alternatively, for a new trial, see Order, No. B-94-1548 (D. Md. Aug. 12, 1998). As explained below, we affirm the district court in every respect except for its award of summary judgment on the ADA retaliation claim, which we vacate and remand for further proceedings.

I.

A.

Rhoads was hired as a financial analyst in September 1987 by Standard Federal Savings Bank ("SFSB"). When the bank failed in October 1992, the Resolution Trust Corporation ("RTC") n1 was appointed as its receiver, and a new federal mutual savings association, Standard Federal Savings Association ("SFSA"), was chartered with the RTC as its conservator. Although Rhoads's employment with SFSB was terminated at its receivership, she was hired simultaneously for the same position with SFSA.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 The RTC was a federal government instrumentality created by Congress in 1989 to resolve the assets of failed savings and loan institutions. The FDIC is the statutory successor to the RTC, following its sunset on December 31, 1995. See 12 U.S.C. § 1441a(m).

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

Rhoads suffers from asthma and related migraine headaches -- conditions exacerbated by exposure to cigarette smoke. After starting work at SFSB, in the bank's Gaithersburg, Maryland office, Rhoads began feeling the negative effects from breathing co-workers' secondhand smoke. Due to SFSB's inability to control smoking on the premises, even after the introduction of a countywide smoking ban in 1990, Rhoads periodically sought medical attention for recurring bouts of bronchitis, pneumonia, severe lung infections, and cluster-migraine syndrome. The amount of secondhand smoke in the offices increased with the arrival of new RTC employees and managers when the bank became SFSA. Internal memoranda documented the detrimental effects of this smoke on Rhoads's health. See, e.g., April 27, 1993 Memorandum from Michael O'Hopp, III, J.A. 49 ("The smoking is having a devastating health effect on one of my employees. . . . Please stop smoking immediately. If not because it is illegal, then out of professional courtesy and human kindness."). Because of her condition, SFSA officials allowed Rhoads to take lengthy absences from work. Eventually, in May 1993, O'Hopp, who was then Rhoads's supervisor, arranged for her to work at home to avoid exposure to secondhand smoke.

During the time period that she worked at home, Rhoads's department was transferred to SFSA's Frederick

Operations Center in Frederick, Maryland ("Frederick Center"). In June 1993, SFSA adopted a smoke-free workplace rule, to take effect on September 1 of that year, at which time smoking would be banned throughout the Frederick Center. That July, RTC officials discovered that Rhoads was being allowed to work at home and, subsequently, asked her to report to the Frederick Center for work. During meetings there on August 12 and 18, and in telephone conversations and letters, bank officials and Rhoads debated whether she would work at the Frederick Center, continue to work at home, or submit the necessary medical certification for disability leave. Ultimately, W. Marshall Jones, SFSA's Senior Vice President for Human Resources, informed Rhoads in an August 25 letter that she should report to work at the Frederick Center on September 1, to coincide with the date the building was to become smoke-free. Jones also said the bank would provide an air purifier for Rhoads's office.

Rhoads maintains, however, that she suffered a significant relapse of asthma and migraine headache symptoms because of her exposure to cigarette smoke at the Frederick Center during the two August meetings there. She saw four doctors during the period of August 12-31 and sought treatment in a hospital emergency room on August 21. Rhoads was given a variety of medications at varying dosages, and the treatments for asthma apparently compounded her migraine headaches. According to Rhoads, on August 31, one of her physicians, Alan S. Chanales, M.D., instructed her not to report to work the following day or for the rest of the week.

Thus, instead of reporting to the Frederick Center on September 1, Rhoads called James Pavlonnis, her immediate supervisor at the time, to relay her doctor's advice and postpone her expected return to work until the

following week. On September 7, Rhoads informed Pavlonnis that she remained ill, her physician instructed her not to report to work that week, and she was using sick leave. Pavlonnis, SFSA's Executive Vice President and Chief Financial Officer, telephoned Rhoads on September 9 and insisted that she provide a doctor's note immediately. At Rhoads's request, Dr. Chanales faxed Pavlonnis a letter that same day. This note, dated September 2, had been composed in response to SFSA's earlier suggestion that Rhoads submit medical documentation supporting a need for disability leave; without mentioning Rhoads's current condition, it indicated that she must work in a smoke-free environment or be allowed such leave. Pavlonnis consequently called Rhoads on September 10 and asked her if she was requesting disability leave. Rhoads -- who had not seen Dr. Chanales's letter -- replied that she did not know and did not feel that she had to decide because she was using accrued sick leave.

That same day, in a letter from Jones, Rhoads was threatened with disciplinary action if she did not report to work by September 13. n2 When Rhoads did not do so, she received a "final warning" letter from Jones, advising her that she had been placed on probation due to her "refusal to report to work the past eight business days[,]" and that her employment would be terminated if she failed to report on September 14. J.A. 269. The plan to terminate Rhoads under these circumstances was approved by a committee of SFSA officials.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 An attorney for Rhoads responded with a letter requesting that she be granted disability leave. The letter also warned that SFSA might be violating the ADA, FMLA, and local laws. See infra Part IV.B.1.

----------End Footnotes----------

Following receipt of the September 13 letter, Rhoads informed Jones by phone and by fax that she remained too ill to work and that her doctor would be sending SFSA further documentation of her condition within a few days. Indeed, on September 13, Dr. Chanales composed a letter stating:

[Rhoads] continues to require treatment for her asthmatic disease which has been exacerbated by exposure to smoke on your premises. This treatment has been complicated by the development of severe headaches as a side effect of some of the medications that are being used to treat her asthma. She still is not in good enough shape to return to work, and I certainly continue to maintain that she should not be allowed in your work place unless it is certifiably free of cigarette smoke.

J.A. 273. Dr. Chanales did not, however, fax the letter to SFSA until September 16 -- one day after senior officials in the RTC's Atlanta office authorized Rhoads's termination. A termination letter from Jones was hand-delivered to Rhoads during the evening of September 15, informing her that she had been fired for refusing to return to work for ten consecutive days "without supervisory approval and in direct defiance of my repeated instructions." J.A. 349. The letter explained:

In light of the accommodations we have made for any health condition you may have, your continued refusal to report to work cannot be tolerated.

Contrary to the assertions in your letter of September 13, 1993, the notes from your physicians do not state that you are sick and cannot or should not be working. The notes state unequivocally that you can work if provided a smoke

free environment. As such, we have done everything your physicians have requested and more. We allowed you to work at home while smoking was still permitted at the Frederick Operations Center. On September 1, 1993, however, the Frederick Operations Center became a no-smoking building. We even provided a further accommodation for you beyond that your physicians requested, placing an air purifier in your work area. Nevertheless, you have continued to refuse to report to work.

Id. The FDIC, on the one hand, maintains that the termination was justified by Rhoads's excessive unexcused absenteeism. Rhoads, on the other hand, contends that SFSA should have at least waited for Dr. Chanales's letter to arrive before making any decision to fire her. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 The evidence reflects, however, that even if SFSA had received Dr. Chanales's letter prior to terminating Rhoads, the bank would have taken the same action, because Rhoads's supervisors had reason to disbelieve that she was sick. For example, during the time period culminating in Rhoads's termination -- September 1-15, 1993 -- she failed to answer her home telephone several times when SFSA officials called her; she did, however, return calls when paged on her beeper. Indeed, during the period of August 14-27, when Rhoads insists she was ill due to cigarette smoke exposure during the August 12 and 18 meetings at the Frederick Center, she used two vacation days but otherwise recorded working 7.5 hours per day on her time sheets. Moreover, the evidence adduced at trial showed that, during the weeks leading up to September 1, Rhoads moved apartments, drove to and attended a half-day orientation session at the University

of Maryland in College Park, and signed up for full-time day classes at the university, scheduled to begin September 7.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

B.

Upon issuance of a "Notice of Right to Sue" letter by the Equal Employment Opportunity Commission, Rhoads filed this action in a timely manner on June 7, 1994, in the District of Maryland. In her amended complaint against RTC, as conservator for SFSA and receiver for SFSB, Rhoads raised claims under the FMLA, ADA, Montgomery County (Maryland) Human Rights Law, the Maryland Wage and Collection Law, and Maryland state common law. RTC was subsequently replaced as defendant by the FDIC. The district court possessed jurisdiction over this action pursuant to 12 U.S.C. §§ 1441a(l)(1) and 1819(b) (actions in which the FDIC and its predecessor the RTC are parties); 29 U.S.C. § 2617(a) (claims under the FMLA); 42 U.S.C. § 12117 (claims under the ADA); and 28 U.S.C. § 1367(a) (supplemental jurisdiction over state law claims).

The FDIC sought summary judgment on all of Rhoads's claims, and Rhoads filed a motion for summary judgment on her FMLA claim and on an affirmative defense raised by the FDIC regarding damages. On February 28, 1997, the district court granted summary judgment for the FDIC on Rhoads's ADA and state law claims, but denied the FDIC's motion for summary judgment on Rhoads's FMLA claim. The court also denied Rhoads's motion for summary judgment in its entirety. The jury trial on the FMLA claim was held from February 23 through March 4, 1998, at which time the jury returned a verdict for the FDIC and the court entered final judgment. Rhoads

subsequently filed a motion for judgment as a matter of law, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or a new trial, pursuant to Rule 59(a). The court denied the motion and soon after granted leave to Rhoads's attorney to withdraw from the case.

Rhoads filed a pro se notice of appeal on September 9, 1998. A month later, she filed a motion for relief from judgment in the district court, which the court stayed pending resolution of this appeal. On February 16, 2000, after Rhoads and the FDIC had filed their appellate briefs, we assigned amicus curiae to brief and argue in support of Rhoads's positions. We possess jurisdiction over this appeal under 28 U.S.C. § 1291.

II.

We have carefully considered Rhoads's contentions that she was entitled to judgment as a matter of law, or at least a new trial, on her claim under the FMLA, 29 U.S.C. §§ 2601-2654, and that the district court erroneously granted summary judgment to the FDIC on her three claims under the employment provisions of the ADA, 42 U.S.C. §§ 12101-12117, 12203, for failure to make reasonable accommodations, discriminatory discharge, and retaliation. With regard to her FMLA claim, the district court required Rhoads to prove to the jury that she suffered from an FMLA-qualifying "serious health condition." See 29 U.S.C. § 2611(11). The court also refused to award Rhoads judgment as a matter of law on this issue based on her assertion that the FDIC waived the right to contest it because of SFSA's failure to pursue the FMLA's "second opinion" procedures. See id. § 2613(c)-(d). Finding no error, we affirm the district court's decisions on these points. The FMLA claim is examined more thoroughly in Part III.

As for the three ADA claims, the district court granted summary judgment on each of them to the FDIC. The court determined that Rhoads failed to adduce sufficient evidence to prove that she was "disabled" within the meaning of the ADA and, thus, could not support her claims for failure to make a reasonable accommodation and discriminatory discharge. See 42 U.S.C. § 12102(2). The court further concluded, with regard to the accommodation claim, that the accommodation sought by Rhoads -- the right to take sick leave whenever her asthma and migraines prevented her from working -- was "facially unreasonable." Rhoads, 956 F. Supp. at 1248. Moreover, with regard to the discriminatory discharge claim, the court ruled that, because of Rhoads's excessive absenteeism, she had "not offered sufficient evidence to establish she was meeting her [employer's] legitimate expectations." Id. at 1249. Because we agree that Rhoads failed to make a sufficient showing of disability, we affirm the district court's award of summary judgment to the FDIC on the failure to accommodate and discriminatory discharge claims, without unnecessarily reaching their other elements. These claims are discussed in Part IV.A.

The ADA retaliation claim, however, did not require proof of a disability. The district court granted summary judgment on this claim, concluding that Rhoads failed to establish evidence to rebut the FDIC's legitimate, nondiscriminatory reason for her discharge -- excessive unexcused absenteeism -- under a burden-shifting proof scheme. We disagree with this determination and conclude that Rhoads not only proffered enough evidence to survive summary judgment under the burden-shifting scheme, but she also established sufficient direct and indirect evidence of retaliation as an alternative avenue of proof. Therefore, we reverse the award of summary judgment to the FDIC on the ADA retaliation claim, and we remand it for further proceedings. This claim is

addressed in Part IV.B. n4

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 We have also reviewed the other contentions advanced by Rhoads on appeal, including, inter alia, that the district court erroneously granted summary judgment to the FDIC on her state law claims. Rhoads also challenges the award of summary judgment to the FDIC on the issue of back pay; the district court concluded that the FDIC's back pay liability, if any, was severed after February 1995, when SFSA was sold and Rhoads's job was accordingly eliminated. We find no merit in Rhoads's assertions of error on these various points and, thus, affirm the district court's determinations of them. See generally Rhoads, 956 F. Supp. 1239.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

III.

We first assess the district court's denial of Rhoads's motion for judgment as a matter of law or, alternatively, for a new trial, on her claim that SFSA unlawfully interfered with her exercise of FMLA rights by firing her. See 29 U.S.C. § 2615(a)(1) (deeming it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" an employee's FMLA rights). n5 The jury concluded that she did not suffer from an FMLA-qualifying "serious health condition." See id. § 2611(11). Rhoads contends, however, that she should not have been required to prove that she was afflicted with such a condition and, regardless, the FDIC waived any right to contest this issue because SFSA failed to follow the FMLA's "second opinion" procedures upon receipt of her physician's certification of her ailments. See id. § 2613 (c)-(d).

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n5 Rhoads also contends that the district court erred by denying her pretrial motion for summary judgment on this claim. However, "this Court will not review, under any standard, the pretrial denial of a motion for summary judgment after a full trial and final judgment on the merits." Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1237 (4th Cir. 1995).

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

Thus, Rhoads insists, she established as a matter of law that she suffered from an FMLA-qualifying condition, and this issue was improperly submitted to the jury. We review de novo the denial of Rhoads's request for judgment as a matter of law, see Deans v. CSX Transp., Inc., 216 F.3d 398, 400 (4th Cir. 2000), and we review the denial of her request for a new trial for abuse of discretion, see Freeman v. Case Corp., 118 F.3d 1011, 1014 (4th Cir. 1997) (acknowledging that "an error of law constitutes an abuse of discretion").

A.

The FMLA is intended "to balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons." Hukill v. Auto Care, Inc., 192 F.3d 437, 441 (4th Cir. 1999) (citing 29 U.S.C. § 2601(b)). It entitles eligible employees n6 to take up to twelve weeks of unpaid leave in any twelve-month period for qualifying medical or family reasons, see 29 U.S.C. § 2612(a)(1), and ensures that these employees will be restored to their same or an equivalent position upon returning to work, see id. § 2614 (a)(1). A qualifying medical reason is defined as "a serious health condition that makes the employee unable to

perform the functions of the position of such employee." Id. § 2612(a)(1)(D). A "serious health condition" is defined, in part, as an illness or impairment that requires continuing treatment by a health care provider, see id. § 2611(11)(B), and that also involves a "period of incapacity requiring absence from work . . . of more than three calendar days," 29 C.F.R. § 825.114(a)(2) (1993). n7

----------Footnotes----------

n6 An "eligible employee" is one "who has been employed for at least 12 months by the employer with respect to whom leave is requested . . . for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). At the summary judgment stage, the district court concluded that Rhoads had worked for SFSA for the requisite amount of time, even though she had been employed there for just under 12 months as of her termination. The court so ruled because Rhoads's combined length of service to SFSB and SFSA exceeded 12 months, and because SFSA was a "successor in interest" to SFSB. See id. § 2611(4)(A)(ii)(II) (defining an "employer" as "any successor in interest of an employer"); 29 C.F.R. § 825.107 (1993) (providing eight factors for evaluating whether an entity qualifies as a successor in interest). The jury later found that Rhoads worked at least 1,250 hours during the relevant period. This issue, Rhoads's status as an eligible employee, is not raised on appeal.

n7 The Secretary of Labor possesses authority to promulgate regulations implementing the FMLA. See 29 U.S.C. § 2654. Interim regulations took effect on August 5, 1993, while final regulations took effect on February 6, 1995. See Sims v. Alameda-Contra Costa Transit Dist., 2 F. Supp. 2d 1253, 1257 n.2 (N.D. Cal. 1998). Because Rhoads's termination and the related events occurred in

September 1993, the interim regulations apply in this case. We defer to the Secretary's interpretation of the FMLA, as expressed in the interim regulations, pursuant to Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). See Miller v. AT&T Corp., 250 F.3d 820, 2001 WL 475934, at *8 (4th Cir. 2001). Further, we recognize that "the expanded final regulations, to the extent they merely amplify the language of the interim regulations, may provide valuable guidance to us as we apply the law to the facts here." Thorson v. Gemini, Inc., 205 F.3d 370, 376 (8th Cir. 2000).

While the interim regulations neither expressly include or exclude asthma and migraines as FMLA-qualifying conditions, the final regulations identify these ailments as conditions that potentially qualify for FMLA leave. See 29 C.F.R. § 825.114(a)(2)(iii)(C) (2000) ("A chronic serious health condition is one which . . . may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.)."); id. § 825.114(c) (specifying "headaches *other than migraine*" in a list of conditions that ordinarily would not merit FMLA leave (emphasis added)). Moreover, the final regulations provide:

> Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence . . . . For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level.

Id. § 825.114(e). We recognize that these final regulations

would have had no effect on this case, because the jury determined, without reaching the question of continuing treatment, that Rhoads simply did not experience a period of incapacity requiring absence from work for more than three days. However, the fact that an employee suffers from the specific conditions of asthma and migraines does not mean that she could never qualify for FMLA leave.

- - - -

the employee is unable to perform the functions of her position. 29 U.S.C. § 2613(b)(1)-(3), (4)(B). The employer must inform the employee of the consequences of failure to provide this certification, see 29 C.F.R. § 825.305(c) (1993), and the employer must allow the employee at least fifteen calendar days to submit it, see id. § 825.305(a). If the employer views the certification as incomplete, the employer "shall advise" the employee of this belief and "provide the employee a reasonable opportunity to cure any . . .deficiency." Id. § 825.305(c).

If, as in this case, the employer questions the soundness of the certification, the FMLA sets forth procedures for obtaining second, and third, opinions. It provides that "the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider" and, if the first and second judgments differ, that "the employer *may* require, at the expense of the employer, that the employee obtain the opinion of a third health care provider[.]" 29 U.S.C. § 2613 (c)(1), (d)(1) (emphasis added). n8 The relevant interim regulation similarly provides that, where an employer doubts the accuracy of a certification, the employer "may require the employee to obtain a second opinion at the employer's expense. . . .If the opinions of the employee's and the employer's designated health care providers differ, the employer *may* require the employee to obtain certification from a third health care provider, again at the employer's expense." 29 C.F.R. § 825.307(a), (c) (1993) (emphasis added). The final regulations contain substantially similar language. See 29 C.F.R. § 825.307(a) (2), (c) (2000).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n8 The statute sets forth the following procedures for obtaining the second and third opinions:

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided . . . the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (C) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

29 U.S.C. § 2613(c)-(d).

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

B.

Our inquiry with regard to Rhoads's FMLA claim is two-fold and focuses on: (1) whether it was appropriate for the district court to require Rhoads to prove that she suffered from a serious health condition in order to prevail on her FMLA interference claim, see 29 U.S.C. § 2611(11); and (2) whether Rhoads established an FMLA-qualifying condition as a matter of law in light of SFSA's failure to pursue the second opinion procedures, see id. § 2613(c)-(d). For purposes of our discussion, we assume, without deciding, that Rhoads proffered adequate notice to invoke FMLA protections and submitted sufficient medical certification of her condition. See 29 C.F.R. § 825.303(a) (1993); 29 U.S.C. § 2613(a), (b)(1)-(3), (4)(B); infra note 9.

1.

First, the district court correctly required Rhoads to prove that she was afflicted with an FMLA-qualifying condition, because otherwise she did not have any right under the Act with which her employer could have interfered. See Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 713 (7th Cir. 1997) (holding that FMLA interference suits are to be resolved "by asking whether the plaintiff has established, by a preponderance of the evidence, that he is entitled to the benefit he claims"); see also Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148 (8th Cir. 2001) (requiring plaintiff in FMLA action to prove a serious health condition pursuant to a three-prong objective test); cf. Miller v. AT&T Corp., 250 F.3d 820, 2001 WL 475934 (4th Cir. 2001) (affirming summary judgment for plaintiff on question of defendant's liability under FMLA where

plaintiff established, inter alia, that she suffered from a qualifying condition).

Rhoads suggests, instead, that once she met the FMLA's notice and certification requirements, she was undisputedly entitled to leave whether or not she suffered from a serious health condition. She relies on a Department of Labor publication for the proposition that "an 'eligible' employee who has met FMLA's notice and certification requirements . . . may *not* be denied FMLA leave." United States Department of Labor, Employment Standards Administration, Wage and Hour Division, FMLA Compliance Guide (emphasis in original). This guide includes a disclaimer, however, recognizing that it is provided merely as a public service, and that "the Federal Register and the Code of Federal Regulations remain the official source for regulatory information published by the Department." Id. Without other support, Rhoads's assertion -- that adequate notice and certification alone entitled her to FMLA leave -- must fail. n9

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n9 The parties disagree over whether Rhoads even rendered sufficient information to put SFSA on notice that she might qualify for FMLA leave. Rhoads contends that she not only provided adequate notice via her September 1, 7, and 13 conversations with SFSA officials, but she also proffered ample certification of her condition within fifteen days of the commencement of her absence, by way of Dr. Chanales's September 2 and 13 letters, despite SFSA's failure to make the requisite written request for this certification. Thus, Rhoads avers, she is entitled to judgment as a matter of law on the notice issue. The FDIC, to the contrary, asserts that Rhoads provided only meager information to her supervisor that

was insufficient to invoke the FMLA, and even Dr. Chanale's September 13 letter was too ambiguous to justify FMLA leave.

Due to the format of the special verdict form, the jury never reached the notice issue. That is, Question 2, parts (a) through (c), addressed whether Rhoads suffered from a serious health condition, while Question 3 encompassed whether she met the FMLA's notice obligations. Once the jury determined in Question 2(a) that Rhoads did not encounter a period of incapacity requiring at least a three-day absence from work, and thus that she was not afflicted with an FMLA-qualifying condition, the jury was directed to end its deliberations without addressing further questions on the verdict form. See J.A. 2031-34.

Because we conclude that the jury was entitled to find that Rhoads did not suffer from an FMLA-qualifying condition, the notice issue is rendered moot. That is, even assuming that Rhoads provided sufficient notice of her purported need for leave, she was not actually entitled to it, because she was not afflicted with a serious health condition within the meaning of the FMLA.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

2.

Next, we consider whether Rhoads established a serious health condition as a matter of law based on SFSA's failure to follow the FMLA's second opinion procedures. See 29 U.S.C. § 2613(c)-(d). On the one hand, Rhoads maintains, inter alia, that to hold otherwise would: undermine the FMLA's procedures for assessing the validity of a leave request; reward miscreant employers; and place employees in need of FMLA leave in the intolerable situation of having to fear that, years down

the road, a jury might disbelieve their doctor's opinion. Rhoads relies, in part, on Sims v. Alameda-Contra Costa Transit District, 2 F. Supp. 2d 1253, 1263 (N.D. Cal. 1998) (holding that if an initial medical certification "sufficiently establishes . . . a serious health condition, [the employer], having failed to exhaust the second and third-opinion process, is not entitled to challenge that medical finding now"), and the district court's decision in Miller v. AT&T, 60 F. Supp. 2d 574, 580 (S.D. W.Va. 1999) (citing Sims for the proposition that "an employer who wishes to contest the validity of a medical certification must use the second-opinion procedures of § 2613(c)(d)"). n10 Significantly, the court in Sims concluded that the second and third opinion provisions in the FMLA are ambiguous and, thus, it undertook to examine the policies underlying the Act, its legislative history, and its structure and internal logic. See Sims, 2 F. Supp. 2d at 1260.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n10 We affirmed the district court's decision in Miller on other grounds. We noted, however, that a second opinion would have been of no use in that case. In Miller, the plaintiff sought leave for a severe bout with the flu. Rather than doubting that the plaintiff had the flu and was unable to work, the defendant questioned whether she had received treatment on two or more occasions and whether the flu was an FMLA-covered illness. See Miller, 250 F.3d at 836 n.13, 2001 WL 475934, at *10 n.13. In this case, conversely, Rhoads's employer did doubt that she was ill and unable to work. Thus, a second opinion might have been useful, if not required.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The FDIC, on the other hand, relies on the Eighth Circuit's determination that "the language of § 2613(c)(1) . . . is merely permissive[.]" Stekloff v. St. John's Mercy Health Sys., 218 F.3d 858, 860 (8th Cir. 2000). That court concluded, accordingly, that the FMLA does not require "an employer to obtain a second opinion or else waive any future opportunity to contest the validity of the certification." Id.

We agree with the Eighth Circuit's assessment in Stekloff. In doing so, we recognize that "under the most basic canon of statutory construction, we begin interpreting a statute by examining the literal and plain language of the statute." Carbon Fuel Co. v. USX Corp., 100 F.3d 1124, 1133 (4th Cir. 1996). The FMLA provides only that an employer "may" seek a second, or third, opinion if it questions the validity of an employee's proffered medical certification of her condition. See 29 U.S.C. § 2613(c)(1), (d)(1); see also 29 C.F.R. § 825.307(a), (c) (1993) (relevant regulation using same terminology, i.e., "may"). Because the term "may" is permissive, the plain language of the statute indicates that an employer who questions the validity of a certification has the option of seeking a second and third opinion, without being required to do so. Moreover, the plain language of the Act does not suggest that an employer must pursue these procedures or be forever foreclosed from challenging whether an employee suffered from a serious health condition; and nothing in the legislative history of the FMLA explicitly supports that interpretation. See Carbon Fuel, 100 F.3d at 1133 ("Absent explicit legislative intent to the contrary, the statute should be construed according to its plain and ordinary meaning."); see also Sims, 2 F. Supp. 2d at 1261 (discussing what the FMLA's legislative history "suggests," without concluding that Congress made its intent clear with regard to the second opinion issue).

This construction of the Act does not mean that there are not potential pitfalls for an employer who chooses not to pursue a second opinion. For example, in Thorson v. Gemini, Inc., 205 F.3d 370, 381-82 (8th Cir. 2000), a precursor to Steckloff, the Eighth Circuit affirmed a grant of summary judgment against an employer who failed, as in this case, to seek even initial certification of the plaintiff's purported serious health condition. While the plaintiff's position was supported by contemporaneous notes from her physician indicating that she was not to work, the employer had to rely on a physician's evaluation made months after the plaintiff was terminated and a psychologist's evaluation of the plaintiff two years later. See id. at 382. Under these particular facts, the court concluded that the employer could not show "that there remained a genuine issue of material fact on the question of Thorson's capacity to perform her job." Id.

A critical distinction between this case and the Eighth Circuit's decision in Thorson is that, in the latter, there was no evidence independent of the defense's belated evaluations of the plaintiff to indicate that she had been misleading her employer about her health condition. In this case, however, Rhoads's employer had immediate reason to believe that she was not really sick. See supra note 3. This evidence, contrasted with the contemporaneous opinion of Rhoads's physician, created a genuine issue of material fact for the jury. Indeed, prior to trial, the district court refused to grant summary judgment to either party, because of the existence of this genuine issue of material fact. Upon hearing the evidence, the jury concluded that Rhoads did not suffer from an FMLA-qualifying condition. For the reasons discussed, Rhoads is not now entitled to judgment as a matter of law or a new trial merely because her employer failed to pursue the FMLA's second and third opinion procedures.

IV.

Rhoads also maintains that the district court erroneously granted summary judgment to the FDIC on her claims under the ADA. We also review de novo this award of summary judgment, "viewing the facts and the inferences to be drawn therefrom in the light most favorable to the nonmovant." Riddick v. Sch. Bd., 238 F.3d 518, 522 (4th Cir. 2000). "Summary judgment is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of l[illegible]'" Id. (quoting Fed. R. Civ. P. 56(c)).

A.

Rhoads's claims under the ADA for unlawful termination and failure to make a reasonable accommodation both require a showing that she was "disabled" within the meaning of the ADA. See, e.g., Haulbrook v. Michelin North America, Inc., 252 F.3d 696, 2001 WL 558152, at *5 (4th Cir. 2001); Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999). n11 The ADA defines a "disability," in part, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual[.]" 42 U.S.C. § 12102(2)(A). n12 "Substantially limits" means, inter alia, "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (2000). Examples of "major life activities" are "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. § 1630.2(i).

----------Footnotes----------

n11 In a wrongful discharge case under the ADA, a plaintiff makes out a prima facie case by demonstrating that "(1) he is within the ADA's protected class; (2) he was discharged; (3) at the time of his discharge, he was performing the job at a level that met his employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination." Haulbrook, 252 F.3d 696, 2001 U.S. App. LEXIS 10699, *14, 2001 WL 558152, at *5.

In a failure to accommodate case, a plaintiff establishes a prima facie case by showing "(1) that he was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position . . .; and (4) that the [employer] refused to make such accommodations." Mitchell, 190 F.3d at 6.

n12 "Disability" under the ADA and "serious health condition" under the FMLA are distinct concepts that require different analyses. See 29 C.F.R. § 825.702(b) (2000).

----------End Footnotes----------

1.

Rhoads maintains that when she suffered the symptoms of asthma and migraine headaches, she was, at times, unable to work, leave her home, care for herself, or perform tasks requiring concentration. Her health conditions, Rhoads avers, also limited her ability to breathe, think, and sleep. Though Rhoads suffered from

asthma as an adolescent, her symptoms had been in remission from childhood through the time she began working for SFSB in 1987. One of her physicians, Dr. Chanales, concluded that Rhoads's "asthma was exacerbated by her exposure to cigarette smoke at work." J.A. 416. She was, however, able to work in a smoke-free environment. Indeed, once Rhoads began working at home in May 1993, she was able to perform all of her job responsibilities and assignments. Dr. Chanales explained why he recommended that this arrangement continue:

What I suggested is that the company allow her to work at home. Because if she were not exposed to the cigarette smoke, then at that point, she would be able to carry on. Asthma is not something that is a permanently crippling disease. Obviously, we can manage asthma. Many asthmatics work, but they can't work in a place where they get sick.

J.A. 816. Although Rhoads was sometimes exposed to cigarette smoke outside the workplace -- such as in shopping malls and restaurants -- she would quickly leave those establishments once she noticed the preliminary signs of exposure, e.g., a stuffy nose, sore throat, and tight chest. Moreover, prior to her employment with SFSB and SFSA, Rhoads had engaged in physical activities including bicycling and ballet dancing.

2.

a.

The district court concluded, first, that Rhoads did not establish that her ability to work was substantially limited. The court relied, in part, on our decision in Gupton v. Virginia, 14 F.3d 203, 205 (4th Cir. 1994), a case remarkably similar to this one, in which the plaintiff,

an employee of the Virginia Department of Transportation ("VDOT"), maintained that her tobacco smoke allergy substantially limited her ability to work n13 In Gupton, the plaintiff asserted that her employer violated her rights by failing to provide a smoke-free workplace. See id. at 204. We held that, in order to make the required showing that she was disabled, the plaintiff "had to show not merely that her allergy made her 'incapable of satisfying the singular demands of a particular job,' but that it 'foreclosed generally [her opportunity to obtain] the type of employment involved.'" Id. at 205 (quoting Forrisi v. Bowen, 794 F.2d 931, 934, 935 (4th Cir. 1986)) (alterations in original). Moreover, following the district court's ruling on summary judgment in this case, the Supreme Court issued its decision in Sutton v. United Air Lines, Inc., 527 U.S. 471, 492, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999), holding that "to be substantially limited in the major life activity of working, . . . one must be precluded from more than one type of job, a specialized job, or a particular job of choice."

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n13 Gupton involved a claim under the Rehabilitation Act of 1973, 29 U.S.C. § 794, whose relevant provisions parallel those of the ADA. See, e.g., Hooven-Lewis v. Caldera, 249 F.3d 259, 268 (4th Cir. 2001).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

We must accordingly agree with the district court that Rhoads has failed to make a sufficient showing that she was substantially limited in her ability to work, where she has established only that she was unable to function in one particular smoke-infested office. As the court explained, "there appears to be no reasonable material or relevant factual dispute concerning [Rhoads's] ability to

perform her job requirements at a very high level, provided that she is given the opportunity to perform her work in a smoke-free atmosphere . . . ." Rhoads, 956 F. Supp. at 1246. Therefore, Rhoads has not shown, as required, that she is generally foreclosed from jobs utilizing her skills because she suffers from smoke-induced asthma and migraines. Cf. Gupton, 14 F.3d at 205 ("While [Gupton] did introduce evidence that her allergy to tobacco smoke made her unable to continue in her current position working as a highway utilities specialist in the VDOT's Fair Ridge office, she presented no evidence that her allergy foreclosed her generally from obtaining jobs in her field."). n14

----------Footnotes----------

n14 According to Rhoads, the FDIC "appears to suggest that the *only* place [she] would likely encounter [secondhand smoke] was in [the SFSA] offices as the result of their continued violations of established smoking bans" -- a "ludicrous" assertion. Appellant's Br., at 44 (emphasis added). The problem for Rhoads, however, is that she does not attempt to show why this suggestion is preposterous. If, for example, Rhoads had shown that she was generally foreclosed from a broad class of jobs utilizing her skills because of a widespread tolerance of interoffice smoking, she would have bolstered her case.

This brings us to another of Rhoads's contentions, "that an employer who is not willing to provide reasonable accommodation to its employees, cannot simply point to other employers who are willing to provide such accommodation, and establish proof that a disabled individual is not precluded from other employment 'in general.'" Appellant's Br., at 44. It does not escape us that the failure of an employer to enforce a smoking ban is hardly commendable. That failure does not mean,

however, that the employer is liable for its actions, or inactions, under the ADA.

----------End Footnotes----------

b.

The district court next addressed Rhoads's contention that other major life activities were also substantially affected by her impairments. The court concluded that, because the substantial limitations on the additional activities cited by Rhoads -- including the ability to breathe -- all were triggered solely by her workplace environment, the proper inquiry "in these limited circumstances" remained focused on her ability to work. See Rhoads, 956 F. Supp. at 1247 (citing for comparison Mobley v. Bd. of Regents, 924 F. Supp. 1179, 1187 (S.D. Ga.) (rejecting claim that asthma presents an "obvious" impairment to breathing when symptoms would arise only in one workplace), vacated, 26 F. Supp. 2d 1374 (S.D. Ga. 1996) (reopening the case for consideration of further evidence)).

In support of the district court's conclusion, the FDIC additionally relies on Keck v. New York State Office of Alcoholism & Substance Abuse Services, 10 F. Supp. 2d 194, 199 (N.D.N.Y. 1998) (concluding that the failure of the plaintiff to allege specific instances of difficulty breathing outside of her workplace, due to her sensitivity to tobacco smoke and perfume, "argues strongly for considering her disability as one limiting the activity of work only"), and Benson v. Lawrence Livermore National Laboratory, 1997 U.S. Dist. LEXIS 16223, No. C95-2746 FMS, 1997 WL 651349, at *4 (N.D. Cal. Oct. 14, 1997) (relying on the district court's decision in this case, Rhoads, to conclude that the plaintiff's ADA claim failed as a matter of law where she proffered no evidence "to

show that her symptoms were triggered by anything but her work environment"), aff'd, 163 F.3d 605 (9th Cir. 1998) (unpublished table decision). In another similar case, Homeyer v. Stanley Tulchin Associates, Inc., the Seventh Circuit reversed the district court's dismissal of the plaintiff's ADA claim based on substantial limitation of her ability to breathe, where the plaintiff had alleged that her breathing was generally impaired by a respiratory condition. See 91 F.3d 959, 962 n.1 (7th Cir. 1996). The court recognized that the plaintiff did not claim that it was only at work that tobacco smoke aggravated her condition, and that there might be many other places where her ailment combined with secondhand smoke limited her ability to breathe. See id. The court suggested, however, that if the plaintiff could not prove after discovery that it was not her workplace alone that aggravated her condition then judgment against her would be appropriate. See id.

We accordingly hold that, where an ADA plaintiff asserts that she is disabled based on a substantial limitation of a major life activity other than working, but her condition is aggravated solely by her workplace environment, her claim must be assessed under our foreclosure test for a limitation on working. See Gupton, 14 F.3d at 205. In this case, the record shows that, following adolescence, Rhoads functioned normally until 1987, when her employment with SFSB and SFSA caused her to be exposed to secondhand smoke in the workplace. Once she was permitted to work at home, her condition improved and her job performance was unimpeded. There simply is no genuine issue of material fact with regard to the conclusion that any substantial limitations on Rhoads's major life activities -- working, breathing, or any others cited by Rhoads -- were solely the result of exposure to secondhand smoke in her workplace. Thus, we review her claim as one based only on a substantial limitation on the

ability to work, and we apply the Gupton foreclosure test. As already discussed above, Rhoads's claim fails under its requirements.

Though Rhoads contends that application of the foreclosure test to claims based on activities other than working contradicts our own precedent, we find her assertion unavailing. Rhoads relies on our decision in Williams v. Channel Master Satellite Systems, Inc., for the proposition that "the general foreclosure test applies only to claims brought under the major life activity of working." 101 F.3d 346, 349 (4th Cir. 1996). In Williams, the plaintiff, who had been directed by her doctor not to lift more than twenty-five pounds following an automobile accident, asserted that she was substantially limited in the major life activities of working and lifting. Id. at 348, 349. We concluded that the district court erred, in relevant part, by suggesting that the foreclosure test must be used to determine if a major life activity other than working -- in that case, lifting -- is substantially limited. Id. at 349. Our Williams decision is distinguishable from this case, however, because, unlike Rhoads's condition, the Williams plaintiff's lifting limitation was not created or aggravated solely by her work environment. If, in this instance, Rhoads had shown that she was debilitated by exposure to secondhand smoke outside of the workplace, then the proper inquiry would have been whether her ability to breathe, etc., was "significantly restricted" as compared to the breathing ability of the "average person in the general population." 29 C.F.R. § 1630.2(j)(1)(ii) (2000). However, because Rhoads established that her abilities to breathe and engage in other life activities were limited only by her exposure to tobacco smoke in the workplace, the proper inquiry is whether, pursuant to the foreclosure test, she was substantially limited in her ability to work.

3.

Rhoads maintains, as alternative bases for establishing a "disability" under the ADA, that she was "regarded as" being disabled, see 42 U.S.C. § 12102(2)(C), and that she had a "record of disability," see id. § 12102(2)(B). First, in order to demonstrate that she was regarded as disabled, Rhoads was required to show that: (1) her employer "mistakenly believed that [she] has a physical impairment that substantially limits one or more major life activities," or (2) her employer "mistakenly believed that an actual, nonlimiting impairment substantially limits one or more major life activities." Haulbrook, 252 F.3d 696, 2001 U.S. App. LEXIS 10699, *15, 2001 WL 558152, at *5 (citing Sutton, 527 U.S. at 489). In Haulbrook, the plaintiff contended that his employer, Michelin, regarded him as disabled because of his breathing difficulties arising from workplace chemical exposures. See id. at , 2001 U.S. App. LEXIS 10699, *18, 2001 WL 558152, at *5. We determined that Haulbrook could not establish that he was regarded as disabled based on a substantial limitation on his ability to work, because his employer "believed Haulbrook could continue to perform his previous job, but simply believed that he might have to be assigned to perform the same work in a different building." Id. at , 2001 U.S. App. LEXIS 10699, *18, 2001 WL 558152, at *6. Moreover, we concluded that Haulbrook could not prove that he was regarded as disabled based on a substantial breathing limitation, because "the company's internal communications simply reflect uncertainty about Haulbrook's condition." Id. at , 2001 U.S. App. LEXIS 10699, *20, 2001 WL 558152, at *7.

For similar reasons, we agree with the district court's conclusion in this case that Rhoads failed to show that her employer erroneously believed that she was substantially limited in her ability to work, because "the record indisputably reveals SFSA thought the plaintiff was capable of performing her job in a smoke-free

environment[.]" Rhoads, 956 F. Supp. at 1247. Furthermore, we conclude that Rhoads cannot establish that her employer mistakenly believed that she was substantially limited in other major life activities, such as breathing, as the evidence shows, at best, that SFSA officials knew she suffered from smoke-induced asthma and migraines, but doubted her declarations pertaining to the severity of her condition.

Next, in order to prove that she had a record of disability, Rhoads was required to establish that she had "a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k) (2000). Contrary to Rhoads's assertion that she had a record of disability, the undisputed evidence reflects that, until starting work for SFSB, Rhoads had not suffered the effects of asthma and migraines since childhood, and she had been able to engage in activities like bicycling and ballet dancing. Thus, Rhoads's contention falters for lack of substantiation.

In summary, Rhoads has failed to establish that she was "disabled" within the meaning of the ADA, either because of being afflicted with an actual disability, being regarded as disabled, or having a record of disability. Therefore, we must affirm the district court's award of summary judgment to the FDIC on her ADA claims for failure to make a reasonable accommodation and discriminatory discharge.

B.

Finally, Rhoads contends that her termination constituted an act of retaliation in violation of the ADA. This basis of recovery does not require that the claimant be disabled. Rather, the ADA provides that "no person shall

discriminate against *any individual* because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a) (emphasis added). In order to prevail on a claim of retaliation, a plaintiff must either offer sufficient direct and indirect evidence of retaliation, or proceed under a burden-shifting method. See Brinkley v. Harbour Recreation Club, 180 F.3d 598, 606-07 (4th Cir. 1999) (outlining the alternative avenues of proof by which an aggrieved employee can prove a Title VII violation); Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001) (recognizing that "because the ADA echoes and expressly refers to Title VII, and because the two statutes have the same purpose -- the prohibition of illegal discrimination in employment --courts have routinely used Title VII precedent in ADA cases").

On the one hand, "an employee may utilize 'ordinary principles of proof using any direct or indirect evidence relevant to and sufficiently probative of the issue.'" Brinkley, 180 F.3d at 607 (quoting Tuck v. Henkel Corp., 973 F.2d 371, 374 (4th Cir. 1992)). To avoid summary judgment, "the plaintiff 'must produce direct evidence of a stated purpose to discriminate and/or [indirect] evidence of sufficient probative force to reflect a genuine issue of material fact.'" Id. (quoting Goldberg v. B. Green & Co., 836 F.2d 845, 848 (4th Cir. 1988)) (alteration in original). "'What is required is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.'" Id. (quoting Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995)).

On the other hand, under the burden-shifting method of proof, to establish a prima facie case of retaliation, a

plaintiff must show that: (1) she engaged in a protected activity; (2) her employer acted adversely against her; and (3) her protected activity was causally connected to her employer's adverse action. See Haulbrook, 252 F.3d 696, 2001 U.S. App. LEXIS 10699, *25, 2001 WL 558152, at *8; Beall v. Abbott Labs., 130 F.3d 614, 619 (4th Cir. 1997). The employer then has the burden "to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for its actions." Beall, 130 F.3d at 619. If the employer does so, the plaintiff "must demonstrate that the proffered reason is a pretext for forbidden retaliation." Haulbrook, 252 F.3d 696, 2001 U.S. App. LEXIS 10699, *25, 2001 WL 558152, at *8. The plaintiff always bears the ultimate burden of persuading the trier of fact that she was the victim of retaliation. See Beall, 130 F.3d at 619.

1.

The dispute culminating in this termination came on the heels of Rhoads's consultation with an attorney and threats of legal action against the bank, in addition to her numerous requests over the years for accommodation of her health conditions (including enforcement of the smoking ban). Rhoads alleges that, during the August 18, 1993 meeting with SFSA officials, including Jones:

I told them that I felt I was being backed into a corner, and had consulted a lawyer as to my rights. Mr. Jones became upset and responded that I would regret that I had done so.

J.A. 1021. Then, in an August 20 letter, Rhoads's lawyer requested that Rhoads be permitted to continue working at home until the nosmoking policy at the Frederick Center proved successful, recognizing that the new policy was untested and "Standard Federal's record in enforcing

existing smoking regulations does not inspire confidence." J.A. 217. In further correspondence of September 13 -- following Jones's September 10 letter threatening disciplinary action against Rhoads -- her attorney admonished that "this situation raises the issue of whether Standard Federal is living up to its obligations under the Americans with Disabilities Act and similar local laws" and warned that SFSA might be violating the FMLA. J.A. 267. In response, Jones wrote in his September 13 letter to Rhoads that, so long as she was an SFSA employee, the bank would communicate with her and not her lawyer. Jones subsequently recommended firing Rhoads and served on the SFSA committee that considered the matter, though he abstained from actually voting on her termination.

SFSA's attendance policy provided the following guidelines for dealing with excessive absenteeism, to be monitored in twelve-month cycles: after four to five absences, a written warning is issued; after six to eight absences, the employee is placed on probation; and, where there are "over ten" absences, termination procedures may be initiated. See J.A. 113-14. In this case, Rhoads maintains that SFSA officials both began termination proceedings and approved her discharge before she accumulated more than ten absences. Moreover, SFSA's own documents show that "there are situations where employees have been absent more than ten days and have not been terminated." J.A. 292. Relatedly, the SFSA sick leave policy directed employees, when they were too ill to work, to notify their supervisors as soon as possible. For absences exceeding five consecutive workdays, employees were mandated to provide a doctor's note. For absences of more than ten days, employees faced termination unless they requested disability leave and submitted supporting medical documentation. In practice, SFSA was known to allow employees to document their illnesses after they

returned to work from sick leave, although Rhoads was denied this privilege.

2.

The district court concluded, without considering the first avenue of proof (sufficient direct and indirect evidence of retaliation), that Rhoads failed to establish a claim under the second avenue of proof (the burden-shifting method). According to the court, even assuming that Rhoads made out a prima facie case of retaliation, she failed to demonstrate that the FDIC's proffered reason for her termination -- her excessive, unexcused absenteeism -- was untrue and, thus, a pretext for discrimination. That is, the court determined that Rhoads was merely the target of "normal sanctions for misconduct" from which she could not be shielded by pursuing a discrimination suit. See Rhoads, 956 F. Supp. at 1250 (quoting Ross v. Communications Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985)). Moreover, the court was impressed by evidence that, even if Jones admonished Rhoads that she would be sorry for consulting a lawyer, he attempted to accommodate her after making that statement and abstained from voting for her termination. And the court noted that, though "SFSA managers . .. testified that SFSA may have applied its sick leave policy more stringently against Rhoads than other employees, all included the important statement that the disparity in Rhoads's treatment . . . was due to her lengthy prior absences[.]" 956 F. Supp. at 1251. This testimony was, the court concluded, "a completely adequate rationalization in the view of this Court." Id.

Rhoads insists, however, that she made a sufficient showing of retaliation under both avenues of proof. First, she maintains that she proffered adequate direct evidence by way of Jones's statement that she would regret

consulting a lawyer. According to Rhoads, this statement was made on August 18, 1993. Two days later, her attorney submitted a letter requesting that she be permitted to continue working at home until the new no-smoking policy at the Frederick Center was deemed effective. Then, on September 13 -- two days before Rhoads's termination -- her lawyer corresponded with SFSA again, this time warning that the bank might be violating the ADA and other laws. Jones soon after recommended Rhoads's discharge and served on the committee that dealt with it, even if he did abstain from voting on this matter.

Moreover, Rhoads contends that she made a sufficient showing of retaliation under the burden-shifting method of proof to survive summary judgment. In support of her prima facie case, Rhoads avers that: she engaged in protected activity by, inter alia, requesting accommodations for her purported disability, such as enforcement of the smoking ban and permission to continue working at home; SFSA acted adversely against her by terminating her; and her protected activity was causally connected to her discharge, as evidenced by their close temporal proximity. To rebut the FDIC's explanation that Rhoads was fired for excessive unexcused absenteeism, she proffered evidence that SFSA sick leave policies were applied more stringently to her than other employees, as well as the direct evidence already discussed above.

We conclude that this direct evidence of a stated purpose to discriminate (Jones's purported threat to Rhoads regarding her consultation with a lawyer) coupled with the related indirect evidence (the timing of her attorney's subsequent letters to SFSA in relation to the bank's decision to fire her, and Jones's involvement in that decision), create a genuine issue of material fact with

regard to Rhoads's retaliation claim. Additionally, we agree with Rhoads that summary judgment was inappropriate under the burden-shifting analysis, and that she established a sufficient prima facie case of discrimination. See, e.g., Carter v. Ball, 33 F.3d 450, 460, (4th Cir. 1994) (recognizing that, where a plaintiff shows that he was discharged soon after engaging in protected activity, the evidence is sufficiently suggestive of retaliatory motive to at least make out a prima facie case of unlawful discrimination).

In so holding, we find ourselves in disagreement with the district court over whether there is adequate evidence to rebut the FDIC's legitimate, non-discriminatory reason for Rhoads's discharge. Though the district court was persuaded that no reasonable fact finder could conclude that Rhoads was the victim of retaliation, this conclusion was reached by improperly drawing inferences in favor of the FDIC. See, e.g., Rhoads, 956 F. Supp. at 1251 ("Jones, rather than harassing Rhoads, appears to have tried to accommodate[ ] her wishes and to have abstained from voting for her termination. In those circumstances, there is a strong inference that Jones had no discriminatory animus against Rhoads."). At the summary judgment stage, the evidence must be viewed in the light most favorable to Rhoads. See Riddick, 238 F.3d at 522. Viewed in the proper light, the record establishes that once Rhoads failed to heed Jones's warning not to consult an attorney, she was terminated, purportedly for excessive unexcused absenteeism, even though her fellow employees had not been discharged for the same conduct. Cf. Baird v. Rose, 192 F.3d 462, 468 (4th Cir. 1999) (concluding that the plaintiff's factual assertions were adequate to state a discrimination claim where the evidence showed, inter alia, that an absenteeism policy used to exclude plaintiff from a school choir had not been uniformly applied). While SFSA officials attempt to justify

this inconsistent treatment based on Rhoads's lengthy prior absences, they fail to acknowledge that, in the months prior to September 1, 1993, Rhoads had been working at home by mutual agreement with a bank supervisor. Although Rhoads may not ultimately prevail on her retaliation claim, there is certainly sufficient evidence to overcome the FDIC's motion for summary judgment.

V.

For all of the foregoing reasons, we reverse the district court's award of summary judgment to the FDIC on Rhoads's retaliation claim under the ADA, but we affirm the court's determinations of the remainder of her claims. See Rhoads v. FDIC, 956 F. Supp. 1239 (D. Md. 1997); Order of Judgment, No. 5-94-1548 (D. Md. Mar. 4, 1998); Order, No. B-94-1548 (D. Md. Aug. 12, 1998).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

LORI D. RHOADS, Plaintiff v. FEDERAL DEPOSIT INSURANCE CORPORATION As Receiver for Standard Federal Savings Bank, et al., Defendants

CIVIL NO. K-94-1548

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

956 F. Supp. 1239; 1997 U.S. Dist. LEXIS 2328; 134 Lab. Cas. (CCH) P33,618; 3 Wage & Hour Cas. 2d (BNA) 1381

February 22, 1997, Filed

DISPOSITION:
Defendants' summary judgment motion is denied in part and granted in part. Plaintiff's partial summary judgment motion is denied.

COUNSEL:
Fred Sommer, Rockville, Maryland for plaintiff.

Robert P. Fletcher, Garrett S. Flynn, Nixon, Hargrave, Devans & Doyle, L.L.P., Washington, D.C. for Federal Deposit Insurance Corporation as Receiver for Standard Federal Savings Association and as Receiver for Standard Federal Savings Bank.

JUDGES:
Frank A. Kaufman, Senior United States District Judge

OPINIONBY:
Frank A. Kaufman

OPINION:

Filed: February 22, 1997

KAUFMAN, Senior District Judge

In this case, Lori D. Rhoads, the plaintiff, asserts several claims against the Federal Deposit Insurance Corporation ("FDIC") as the receiver of her former employer Standard Federal Savings Bank ("SFSB"), and Standard Federal Savings Association ("SFSA"), all of which were triggered by her termination for excessive absences. Plaintiff asserts her absences from work were justified due to severe asthma and migraines, and protected by two federal statutes, the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12117 ("ADA") and the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 ("FMLA"), which establish federal question jurisdiction in this case. In its entirety, Rhoads's suit involves the following:

(1) Failure to make reasonable accommodations under the ADA (Counts II and VIII);

(2) Retaliation under the ADA (Counts II and VIII);

(3) Interfering with, restraining, and denying plaintiff's exercise of her rights under the FMLA (Count I);

(4) Violation of Montgomery County Human Rights Law (Counts III and IX);

(5) Violation of a Maryland common-law "duty to provide a safe workplace" (Counts V and X); and

(6) Failure to pay accrued vacation pay in breach of an alleged employment agreement and the Maryland Wage and Payment and Collection Law (Counts VI and VII).

Counts I to III and V to VII are against the FDIC as Receiver for SFSA, plaintiff's employer from October 21, 1992 through September 15, 1993. n1 Counts VIII to X are against the FDIC as Receiver for SFSB, plaintiff's employer prior to October 21, 1992. n2 Before this Court are the defendants' summary judgment motion with regard to all of plaintiff's claims, and plaintiff's cross-motion for summary judgment with regard to Count I of her complaint (her FMLA claim against the SFSA), her claim for payment of unused vacation pay (Counts VI-VII), and SFSA's defense based on allegedly "after-acquired evidence." For the reasons discussed in this Opinion, defendants' summary judgment motion will be denied in-part and granted in-part, and plaintiff's summary judgment motion
will be denied.

----------Footnotes----------

n1 During the relevant period in this case, namely October 21, 1992 through September 15, 1993, the Resolution Trust Corporation ("RTC") acted as conservator for the SFSA, however, since that time, effective June 30, 1995, the Office of Thrift Supervision ("OTS") appointed the RTC receiver for SFSA. Following this substitution of the RTC as receiver for SFSA, the RTC was statutorily terminated and succeeded by the FDIC. The parties in this lawsuit have been appropriately converted. (See Order of May 14, 1996.)

n2 The RTC was appointed receiver of SFSB on October 21, 1992 by the RTC. Since that time, as discussed supra, the FDIC has replaced the RTC, and the parties in this lawsuit have been appropriately converted.

----------End Footnotes----------

I. Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue of material fact and [where] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). While the non-moving party is entitled to have "all reasonable inferences . . . drawn in its respective favor," Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1129 (4th Cir. 1987), the non-movant, in resisting summary judgment, must "go beyond the pleadings and by [its] own affidavits . . . . depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Summary judgment is appropriate, therefore, where there is no genuine issue of material fact that could lead a rational trier of fact to find for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L.Ed. 2d 202, 106 S. Ct. 2505 (1986).

II. Statement of the Facts

Rhoads, a financial analyst, went to work for SFSB in September of 1987. Rhoads continued her work for SFSB and its successor SFSA, with a brief interruption from January, 1990 to February, 1991, until her termination on September 15, 1993. (Rhoads Dep. at 44.) Rhoads suffers from asthma, a chronic respiratory condition, and from severe migraines. (Rhoads Decl. P2.) Plaintiff's asthma and migraines are triggered by cigarette smoke. (Rhoads Decl. P5.) While working for the SFSB, and its successor, plaintiff was repeatedly exposed to cigarette smoke due to smoking among co-workers in the office. (Rhoads Dep. at 125-28.) Internal memorandums documented the negative effects plaintiff's exposure to cigarettes was having on her health. (Jones Dep. Ex. 10)

("As recently as February 18th Ms. Rhoads, was in the office and RTC officials were smoking. Ms. Rhoads became extremely ill due to smoke."); Rhoads Dep. Ex. 9 ("The smoking is having a devastating health effect on one of my employees. She is suffering pneumonia, bronchitis and several other adverse illnesses. Please stop smoking immediately.").) Apparently, as a result of management's inability to control smoking among employees in the office, and hence, to aid in the improvement of Rhoads's health, Rhoads was allowed to work at home from May to August of 1993. n3 (Muniz Dep. at 42; Rhoads Dep. at 130.)

----------Footnotes----------

n3 Rhoads's supervisor, Michael O'Hopp, has testified that he in fact allowed Rhoads to work at home, beginning in May of 1993, because of her threats to expose romantic relationships involving O'Hopp and the plaintiff, and O'Hopp and another employee. (O'Hopp Dep. 104.)

----------End Footnotes----------

Contemporaneous with Rhoads's ongoing struggle to achieve a workable accommodation from her employer with regard to her health conditions, SFSB was placed in receivership by the Office of Thrift Supervision ("OTS") on October 21, 1992, and the RTC was appointed as Receiver for SFSB. On the same day, OTS chartered a new federal mutual savings association, SFSA, and the RTC was appointed as Conservator for the new association. Although Rhoads's employment with SFSB was terminated at its receivership, she was hired simultaneously by the RTC/Conservator for SFSA. n4

----------Footnotes----------

n4 The RTC/Conservator for SFSA, as Rhoads's employer from October 21, 1992 until her termination, will be referred to in the opinion, wherever possible, simply as the SFSA.

----------End Footnotes----------

After the RTC intervention, SFSA began to take a more aggressive stance towards personnel matters, such as those involving the plaintiff, and consequently placed a large premium on the requirement that employees work at SFSA offices. (Jones Dep. at 233; Muniz Dep. at 286.) Rhoads was first apprised of that new emphasis on reporting to work, during a meeting at the SFSA's Fredericksburg Operations Center ("FOC") with R. Emmett Oarlock, former president of SFSB, and then executive vice president of SFSA on August 12, 1993. (Rhoads Dep. at 303-05.) W. Marshall Jones, SFSA's Vice President of Human Resources, also participated in the meeting. During that meeting plaintiff was told she must report to work at the FOC on August 18, 1993, or qualify for SFSA's disability policy which required medical certification. (Rhoads Dep. at 305, 315.) Plaintiff said she could not report on that date due to her sensitivity to smoke, and its continued prevalence at the FOC. (Id.) In fact, on the way to the meeting, plaintiff observed employees smoking in the offices adjoining Oarlock's office, both exposing her to smoke, and heightening her concerns. (Rhoads Dep. at 309.)

To accommodate plaintiff's concerns, SFSA officials moved the date Rhoads was to report to work to September 1, 1993, to coincide with the date the building became smoke-free. (Swenck Dep. at 24.) Rhoads was informed of that accommodation, and the addition of an air-purifier at her desk, in a letter which Jones sent to her on August 25, 1993. (Rhoads Dep. Ex. 18.) After the August 12, 1993

meeting, however, Rhoads maintains that she suffered a significant relapse of her poor health due to her exposure to smoke during her visit to FOC. Thus, by August 21, 1993, Rhoads suffered from migraines so severe that she sought treatment in a hospital emergency room. (Rhoads Decl. P 10.)

On September 1, 1993 Rhoads called her supervisor to inform him that she was too sick to return to work. Against the aforementioned background, it is the events of the fifteen days stretching from September 1st to September 15th, which are quite critical to this suit. n5 During that period, Rhoads maintained that she was too sick to return to work, and the RTC maintains she did not follow the institution's sick leave procedures, or appropriately establish her illness or disability with medical documentation. The RTC takes the position that Rhoads's disregard of SFSA policies justified Rhoads's termination for excessive and un-excused absenteeism. In that regard, the question arises as to whether the personnel policies of the SFSA should be the sole source of guidance for evaluating the legitimacy of Rhoads's termination, or whether the facts at hand cause the federal workplace mandates of the ADA or the FMLA to be otherwise applied.

----------Footnotes----------

n5 Rhoads was afforded lengthy absences from work in the past, absences approved by supervisors. (Pavlonnis Dep. at 93.) Additionally, the record in this case clearly indicates that Rhoads was considered a valuable employee. She was given significant raises, good performance evaluations, and appears to have performed complex financial analysis upon which her supervisors relied. (Jones Dep. Ex. 8.)

----------End Footnotes----------

The SFSA sick leave policy, as revealed in this case through witness testimony and exhibits, required employees to notify their supervisors when they could not report to work due to an illness. (Muniz Dep. at 31.) For absences of three to five days, employees were called upon to provide written certification from a doctor stating that the employee is ill and unable to report to work. (Muniz Dep. at 31.) Employees absent for more than ten days were required to ask for disability leave and to back up their request with a note from a doctor stating disability leave was necessary, or face termination. (Rhoads Dep. at 315; Pavlonnis Dep. Ex. 18 at 90062-63.)

While Rhoads notified her supervisor that she was ill and unable to report to work on September 1, 1993, and continued to make subsequent calls, she did not provide her employer with a note from a doctor certifying that she was too ill to work until after the close of business of her eleventh day away from work. (Muniz Dep. at 154.) Rhoads failed to provide a timely letter from a physician even though James Pavlonnis, her immediate supervisor, reminded Rhoads, on her eighth day absent, that an appropriate note was necessary to justify her absence, and Jones sent Rhoads a probation letter on her ninth day absent. (Pavlonnis Dep. Ex. 8; Rhoads Dep. Ex. 24.) Although sick leave was handled on a case-by-case basis by SFSA, and at times SFSA allowed its employees to provide documentation of their illness after they returned to work, witness testimony submitted in this case indicates that SFSA literally reached a breaking point with Rhoads. (Muniz Dep. at 256.) SFSA, it appears, as time went on, strictly applied its sick leave policy to Rhoads, as a result of the leniency which she had been afforded with regard to her attendance in the past. (Garlock Dep. at 15.) This court can find no reason, in the

absence of a federal law to the contrary, to question SFSA's full implementation of its policies.

III. ADA Claim

In her complaint, plaintiff sets forth various theories under which she contends the defendants have discriminated against her in violation of the ADA, including SFSA's failure to accommodate her disability, unlawful termination, and retaliation. This Court will treat each of these arguments in turn.

a. Failure to Make Reasonable Accomodations

The ADA prohibits employment discrimination against "qualified individual[s] with a disability because of the disability of such individual . . . ." 42 U.S.C. § 12112(a). In the context of the ADA, the term discriminate includes: "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . ." 42 U.S.C. § 12112(b)(5). Plaintiff asserts that prior to her termination, she requested an ADA accommodation, i.e., the right to "take sick leave while her disability prevents her from working" (Rhoads Opp. at 31.) Rhoads argues that had SFSA afforded her that reasonable accommodation, SFSA should not have terminated her under its own sick leave policies.

To establish her claim for discrimination based on denial of accommodation, Rhoads must demonstrate: "(1) she is an 'otherwise qualified individual with a disability,' i.e., able to perform the essential functions of the job in question with or without reasonable accommodation; and

(2) if a reasonable accommodation is necessary, that the denial of the accommodation was made in a discriminatory fashion." Bryant v. Better Bus. Bureau of Greater Maryland, 923 F. Supp. 720, 733 (D. Md. 1996) (Davis, J.) (citing Myers v. Hose, et. al, 50 F.3d 278, 281-82 (4th Cir. 1995)).

(i) Plaintiff's Disability

The RTC argues plaintiff's discrimination claim must fail because she cannot establish that she is a disabled individual. Those regarded as having a disability protected by the ADA are persons with "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or [who are] regarded as having such an impairment." 42 U.S.C. § 12102(2).

Rhoads asserts that she is disabled by reason of two physical impairments, asthma and migraines, which are triggered principally by cigarette smoke, and which substantially limit her major life activities. The Code of Federal Regulations explains "major life activities" as those which an average person can perform with little or no difficulty, such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I). The plaintiff has offered testimony that when she suffers from her asthma and migraines, she is unable to work, do things such as drive and sleep, and, is at times substantially limited in her ability to breathe. (Rhoads Decl. PP 4, 5.)

In employment discrimination suits, the Fourth Circuit requires courts to perform a particularized inquiry into "whether a particular impairment constitutes for the particular person a significant barrier to employment."

Forrisi v. Bowen, 794 F.2d 931, 932 (4th Cir. 1986) (Wilkinson, J.). The defendants point out that when the major life activity at issue is working, the plaintiff must establish she was not only incapable of performing her particular job but that her disability "foreclosed her generally from obtaining jobs in her field." Gupton v. Commonwealth of Virginia, 14 F.3d 203, 205 (4th Cir. 1994) (Russell, J.), cert. denied, 513 U.S. 810, 130 L. Ed. 2d 17, 115 S. Ct. 59 (1994). This "foreclosure" test incorporates the ADA requirement that the major life activity impaired for ADA purposes must be significant and severe as compared to conditions more widely shared by the public. See Forrisi, 794 F.2d at 933-34. Cf. 29 C.F. R. § 1630.2(j)(3) ("With respect to the major life activity of working--(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person. . . ."). Accordingly, the Fourth Circuit Forris/Gupton foreclosure test appears to serve the useful purpose of narrowing the group of individuals with regard to whom employers should focus their resources, thereby ensuring that only the truly disadvantaged reap the rewards associated with the ADA mandate placed on employers to accommodate the disabled.

In this case, plaintiff alleges that she was unable to work in a smoke-filled environment due to the effect smoke had on her breathing and headaches. However, there appears to be no reasonable material or relevant factual dispute concerning the plaintiff's ability to perform her job requirements at a very high level, provided that she is given the opportunity to perform her work in a smoke-free atmosphere, as she did at home from May to August of 1993, or as SFSA offered beginning in September 1, 1993. Thus applying the Forrisi/Gupton foreclosure test, Rhoads cannot argue that a class of jobs free from exposure to

smoke has been foreclosed as a result of her impairments, and hence, Rhoads cannot show her ability to work is substantially limited. Consequently, as Rhoads's strongest claim of substantial impairment to a major life activity, i.e., her ability to work, fails, Rhoads's claim that she has a disability is fatally weakened. Cf. Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454-55 (7th Cir. 1995) (doctor's inability to perform medical positions requiring long shifts or 36 hour call duties due to his impaired visual condition did not "necessarily" render him disabled within the meaning of the ADA); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992) (chemist unable to establish limitations of "major life activities" sufficient to establish disability simply by showing that her sensitivity to certain chemicals restricted only her ability to do lab work), cert. denied, 507 U.S. 910, 113 S. Ct. 1255, 122 L. Ed. 2d 653 (1993); Wright v. Tisch, 45 Fair Empl. Prac. Cas. (BNA) 151, 152-53 (ED. Va. 1987) (Merhige, J.) (plaintiff who "is not precluded from working indoors where a moderate amount of dust is present," and can take part in outdoor employment, is not a handicapped individual where her dust allergy restricted her only from working in the "unusual, if not unique, environmental conditions of [her workplace]").

The plaintiff, however, strenuously argues application of the foreclosure test to her claim is only a starting point for determining whether or not she is a disabled individual because she alleges additional major life activities, such as breathing, are effected by the asthma and migraines she suffers when exposed to smoke. See Williams v. Channel Master Satellite Systems, Inc., 101 F.3d 346, 349 (4th Cir. 1996) (per curiam) ("the general foreclosure test applies only to claims brought under the major life activity of working"). On the surface, plaintiff's argument has merit. Indeed, to find otherwise would allow employers to avoid grappling with their responsibility to

accommodate employees with a disability that effects numerous aspects of their lives, in contravention of the ADA. However, where the additional major life activities which the plaintiff claims are substantially limited, such as the ability to "breathe," are all triggered solely by her workplace environment, n6 the traditional approach found in the ADA for determining whether such impairments are sufficiently severe to be classified as a disability appears inadequate. In these limited circumstances, the proper inquiry should remain focused on the extent to which an ADA claimant is capable of successfully pursuing a given vocation with or without reasonable accommodation. Cf. Mobley v. Bd. Of Regents, 924 F. Supp. 1179, 1187 (S.D. Ga. 1996) (rejecting claim that asthma presents an "obvious" impairment to breathing when symptoms would arise only in one workplace).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n6 Outside the episodes of asthma and migraines plaintiff alleges she suffered due to her exposure to smoke at work, plaintiff appears to have led a full life in every respect. For instance, unlike many asthma sufferers, plaintiff is able to bicycle and teach ballet dancing when not exposed to cigarette smoke. (Rhoads Dep. 896-97.) Additionally, Rhoads testified that her migraines are completely correlated to exposure to cigarette smoke. (Rhoads Dep. at 905.)

- - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - -

On a final note, this Court recognizes that in some instances asthma and/or migraines may serve as the basis for a disability claim. See e.g., Carlson v. Inacom Corp, 885 F. Supp. 1314, 1320 (D. Neb. 1995) (disability established with regard to plaintiff who suffered

migraines over a period of twenty years, on a monthly basis regardless of her environment which left her incapable of caring for her son, driving or working); Dutton v. Johnson County Bd. Of Comm'rs., 859 F. Supp. 498, 506 (D. Kan. 1994) (severe migraines that comprise a permanent, intermittent and unpredictable condition over a twenty year period, and which were unconnected to any particular type of work constituted a disability); Hamper v. Virginia Elec. & Power Co., 831 F. Supp. 1300, 1306 (E. D. Va. 1993) (in a decision decided prior to Gupton, the court treated severe bronchial asthma as a disability without an extensive discussion of the severity of the plaintiff's asthma outside his particular workplace). This case, however, for the reasons discussed supra, is simply not one of those instances.

Finally, this Court rejects Rhoads's alternative approaches for establishing a disability. Rhoads asserts that even if this Court finds she has not established an impairment which substantially limits one or more major life activities, she was "regarded as" an individual with a disability by SFSA, and/or SFSA had a "record of' her disabilities, and therefore her circumstances fall within the definition of an individual with a disability and should be afforded the protection of the ADA. See 42 U.S.C. § 12102. The expansive definition of an individual with a disability which Rhoads seeks to establish was adopted to "combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped." School Bd. of Nassau County v. Arline, 480 U.S. 273, 279, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987) (citation omitted). Plaintiff's approach must fail because to allow plaintiff to utilize either of the alternative definitions for a disabled individual would contort the purpose of those provisions. There is no evidence in this case that the defendants erroneously perceived that Rhoads was substantially limited in her ability to do her job. Rather, the record

indisputably reveals SFSA thought the plaintiff was capable of performing her job in a smoke-free environment, n7 and as a result, moved, at least partially, to create such an environment for her to work.

----------Footnotes----------

n7 SFSA's impression of Rhoads's workplace needs was appropriately based on the assertions of her doctors in numerous letters to SFSA. (Chanales Dep. Ex. 2, Tab A at unnumbered pages 9-12; Rhoads Dep. Ex. 16; Rhoads Dep. Ex. 20.)

----------End Footnotes----------

ii. Defendants' Reasonable Accomodation

Assuming, arguendo only, that Rhoads is a qualified individual with a disability, she has not sufficiently met her burden of proffering that SFSA failed to provide a reasonable accommodation which would allow her adequately to perform her job. n8 See Tyndall v. National Educ. Centers, 31 F.3d 209, 213 (4th Cir. 19) (Wilkinson, J.); Bryant, 923 F. Supp. at 733. Plaintiff asserts that the ADA accommodation which she sought prior to her termination was the right to take sick leave while her disability prevented her from working. Plaintiff has not established that SFSA failed to accommodate her disability in a discriminatory manner because she has not shown that she made a timely request for her proposed accommodation. Furthermore, the accommodation which Rhoads asks this Court to evaluate is rejected in this case because it is in substance a request not to perform her job, and hence, facially unreasonable.

----------Footnotes----------

n8 Had Rhoads been able to establish such discrimination the burden would have shifted to SFSA to rebut plaintiff's assertion that the accommodation which plaintiff proposed was reasonable or otherwise to establish that plaintiff's accommodation would cause "undue hardship," as defined in 42 U.S.C. § 12111(10), for SFSA. See Champ v. Baltimore County, 884 F. Supp. 991, 999 (D. Md. 1995) (Hargrove, J.), aff'd, 91 F.3d 129 (1996). While accommodation and undue hardship have been treated as two sides of the same coin by many courts, undue hardship has been treated by others as the final test against which an employer's responsibilities will be judged. Compare Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2nd Cir. 1995) ("Meeting the burden of nonpersuasion on the reasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship amount to the same thing."), with, Vande Zande v. St. of Wisconsin Dept. of Administration, 44 F.3d 538, 543 (7th Cir. 1995) (Posner, C.J.) ("The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."). See generally, Bryant, 923 F. Supp. at 733-34 (exploring the relationship between reasonable accommodation and undue hardship). Because the plaintiff, in this case, has failed to proffer significant evidence that she was denied a reasonable accommodation, the more strenuous inquiry of undue hardship is not required.

----------End Footnotes----------

While it is undisputed that the plaintiff notified SFSA

that she suffered from asthma and that, as a result, she required a smoke-free workplace, the record reveals that the plaintiff did not adequately inform SFSA of her recurring problem with migraines, or ask for the use of sick leave or to otherwise be allowed unscheduled absences as an accommodation for migraines. Outside of the papers filed in this case, the first time that plaintiff appears to have complained about headaches to SFSA was on September 2, 1993 during a telephone call with Jim Pavlonnis. (Pavlonnis Dep. Ex. 18 at 900055.) Further, notes taken by Pavlonnis regarding his conversations with Rhoads during her September absence indicate that plaintiff first requested the use of accrued sick leave to justify her continued absences on September 8th. (Pavlonnis Dep. Ex. 18 at 900057.) Finally, after receiving a note from Rhoads's doctor reiterating Rhoads's asthma condition and need for a smoke-free environment, Pavlonnis called Rhoads on September 10th and asked her if she was requesting disability leave. Rhoads replied that she did not know, and did not feel that she had to decide because she was using accrued sick leave. (Pavlonnis Dep. Ex. 19 at 90066.)

Rhoads asks this Court to allow her to transform her request for the use of accrued sick leave-which request it should be noted did not comply with SFSA's policy that sick leave requests be accompanied by a doctor's note explaining the need for sick leave into a request for accommodation for a disability, although that latter request was not previously communicated to her employer. This Court declines to stretch the ADA that far, and consequently to require employers to anticipate new disabilities and new accommodations, without adequate information, in order to give absent employees that much benefit of the doubt.

SFSA should not be held liable for an accommodation

which it was never requested to make. "The E.E.O.C. regulations provide that 'in general. . . it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.'" Bryant, 923 F. Supp. at 737 (citing 29 C.F.R. § 1630.9, at 414 (Appendix: Interpretive Guidance)). See also Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996) (reasonable accommodation claim properly subjected to summary judgment against claimant where employer made efforts to accommodate employee on the information it possessed); Carlson, 885 F. Supp. at 1322 (employee, who was terminated for excessive absenteeism, did not make a prima facie showing that employer failed to provide reasonable accommodation, where the employee did not explain to her employer that she suffered from a disability, i.e., migraines, and needed accommodation).

Finally, reasonable accommodations under the ADA are those accommodations which allow otherwise qualified disabled individuals to "perform the essential functions" of their job. 42 U.S.C. § 12111(8). Plaintiff asks for an accommodation which defeats her ability to perform a function of her job, namely, attendance. Regular attendance is generally, unless otherwise established, regarded as an essential function of such employment. See Tyndall, 31 F.3d at 213 ("In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis."); Walders v Garrett, 765 F. Supp. 303, 309 (E.D. Va. 1991) (Ellis, J.) ("in general, employees cannot perform their jobs successfully without meeting some threshold of both attendance and regularity"), aff'd, 956 F.2d 1163 (4th Cir. 1992). Many courts have found open-ended work schedules to fail as a reasonable accommodation. Myers v. Hose, 50 F.3d 278, 282-83 (4th Cir. 1995) (Wilkinson,

J.) (reasonable accommodation provisions of the ADA do not require employers to "wait indefinitely," providing extended leave, while an employee's health improves); Carr v. Reno, 306 U.S. App. D.C. 217, 23 F.3d 525, 531 (D. C. Cir. 1994) ("To require an employer to accept an open-ended 'work when able' schedule for a time-sensitive job would stretch 'reasonable accommodation' to absurd proportions . . . ."); Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 878 n.8 (9th Cir. 1989) (employers legitimate needs rendered it unreasonable to require employer to allow employee to use accrued sick leave intermittently when employee's migraine condition precluded his ability to work), cert. denied, 498 U.S. 814, 112 L. Ed. 2d 28, 111 S. Ct. 53 (1990).

This court is mindful that the use of accrued sick leave, part-time or modified work schedules may in some cases be an appropriate accommodation. See 29 C.F.R. § 1630.2 (o)(2), § 1630.2(o) (Appendix). However, such accommodation was not required in this case. Rhoads had worked at home for over four months when she allegedly requested the use of sick leave as an accommodation. An employer who demonstrates such flexibility towards an employee should be allowed to set reasonable limits on the time which an employee spends away from the office. That is especially true where the employer's request that the employee return to a regular and reliable in-office work schedule comes after instituting the alternative accommodations requested by the employee as a prerequisite to her return to the office.

b. Unlawful termination

Typically, to establish a wrongful discharge claim under the ADA, a plaintiff must prove: "(1) she was in the protected class; (2) she was discharged; (3) at the time of discharge, she was performing her job at a level that met

her employer's legitimate expectations; and (4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination." Ennis v. National Assoc. of Bus. and Educational Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995) (Luttig, J.) (citation omitted). Plaintiff's unlawful termination claim fails because she has not proffered evidence with sufficient significance that she was within the class protected by the ADA--as explained above, Rhoads is not a disabled individual. Furthermore, as discussed supra, given Rhoads's excessive absence from her job in contravention of her employer's express wishes, Rhoads has not offered sufficient evidence to establish she was meeting her employers legitimate expectations.

c. Retaliatory Discharge

The ADA prohibits employers from retaliating against employees who enforce their rights under the act. See 42 U.S.C. § 12203(a). To establish a retaliation claim under the statute, Rhoads must show by a preponderance of the evidence: "(1) she engaged in protected activity; (2) [her] employer took an adverse employment action against [her]; and (3) a causal connection exists between the protected activity and the adverse action." Harmer, 831 F. Supp. 1300 at 1308. If the plaintiff satisfies that burden, the burden shifts to SFSA to articulate a legitimate nonretaliatory reason for plaintiff's discharge. See Ennis, 53 F.3d at 58; Harmer, 831 F. Supp. at 1308. If SFSA satisfies that burden, then the presumptions created by plaintiff's prima facie case disappear, and the plaintiff is left with the ultimate burden of showing that SFSA's reasons for her termination are "unworthy of belief" or that she was in fact terminated in retaliation for engaging in protected activity. See Harmer, 831 F. Supp. at 1308.

Prior to plaintiff's termination, she engaged in at least

one form of protected activity under the ADA. Rhoads requested that her asthma be accommodated on numerous occasions, apparently by urging her employer to implement a smoke-free workplace. Furthermore, Rhoads threatened legal action to enforce her rights under the ADA during the period preceding her termination. On August 20, 1993, and again on September 13, 1993, plaintiff's attorney wrote SFSA concerning SFSA's demands that plaintiff return to work and expressed the belief that SFSA was not complying with the ADA. (Pavlonnis Dep. Ex. 18 at 900052-53, 900068-69) Assuming, that based on the attorney's participation, that plaintiff proffered sufficient evidence of protected activity to establish a prima facie case of retaliation, SFSA has a clear and articulated reason for terminating Rhoads--unexcused absenteeism. The burden, consequently, returns to Rhoads to establish that she was in fact a victim of discrimination.

In Ross v. Communications Satellite Corp., a Title VII retaliation case, the Fourth Circuit explained that, for an employee to "disprove a legitimate nondiscriminatory explanation for adverse action. . . he must show that the adverse action would not have occurred 'but for' the protected conduct." Ross, 759 F.2d 355, 365 (4th Cir. 1985) (Wilkinson, J.). n9 To rebut SFSA's legitimate business reason for her termination, Rhoads testifies that she was told she would regret consulting a lawyer by a SFSA manager and asserts that witness testimony in this case shows that she was treated differently from other employees who requested sick leave without proper medical certification. (Rhoads Decl. P 10; Jones Dep. at 148-150; Muniz Dep. at 256, 285; Garlock Dep. at 15.) Rhoads argues that the testimony she has proffered shows that had she not demanded accommodations and threatened legal action on various instances, SFSA would not have strictly enforced its sick leave policy against her.

----------Footnotes----------

n9 The McDonnell Douglas, Ross approach has been incorporated into the review of ADA retaliation claims in this circuit. See Ennis, 53 F.3d at 57-58 (referring to McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)); Harmer, 831 F. Supp. at 1308.

----------End Footnotes----------

The evidence upon which Rhoads relies, while perhaps creating a factual question as to whether her availment of legal representation and requests for accommodation were a factor in her termination, does not in any event, in and of itself, satisfy the Fourth Circuit's "but for" test. "[Initiating legal action under anti-discrimination statutes] does not shield employees from normal sanctions for misconduct. 'It would be incongruous--and certainly not required by law--to give any employee, even one engaged in exemplary efforts to vindicate the law of the land, a stranglehold on a job irrespective of that employee's material, work-related flaws.'" Ross, 759 F.2d at 366 (citation omitted).

Particularly, when viewed individually, the evidence which Rhoads proffers is obviously insufficient to meet her ultimate burdens. Jones, SFSA's V.P. for Human Resources, whom Rhoads claims threatened adverse action when she told him she wanted to see a lawyer, was in fact, on the committee which considered her termination, and Jones did not vote in favor of termination. (Muniz Dep. at 27; Jones Dep. at 101.) Furthermore, that alleged threat was communicated during the August 12, 1993, meeting in which Rhoads was asked to report to work, and during which she expressed the desire not to do so. n10 After that meeting Rhoads

was further accommodated by Jones who agreed to allow her to delay her report date from August 18, 1993, to September 1, 1993 until the FOC was completely smoke-free. (Rhoads Dep. Ex. 18.) Jones, rather than harassing Rhoads, appears to have tried to accommodated her wishes and to have abstained from voting for her termination. In those circumstances, there is a strong inference that Jones had no discriminatory animus against Rhoads.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n10 Rhoads's Declaration states this meeting, and alleged threat, took place on August 18, 1993. This is contrary to other testimony proffered in this case. (Jones Dep. at 247.)

- - - - - - - - - - - - - - - --End Footnotes- - - - - - - - - - - - - - - -

Finally, Rhoads would have this Court rely on testimony from SFSA managers to conclude that SFSA would not have fired her had she refrained from insisting on accommodation to her disability and pursuing the help of an attorney. Rhoads's arguments, in that regard, may not succeed for two reasons. First, the record shows that her one reasonable request for accommodation, a smoke-free workplace, was met by SFSA, without undue delay, and that her lawyer's letters appear not to have been a factor in the decision to terminate her. n11 Second, each of the SFSA managers who testified that SFSA may have applied its sick leave policy more stringently against Rhoads than other employees, all included the important statement that the disparity in Rhoads's treatment, assuming there was some, was due to her lengthy prior absences a completely adequate rationalization in the view of this Court.

----------Footnotes----------

n11 The first letter sent by Rhoads's attorney, dated August 20, 1993, requested that she not be required to return to work until her workplace was "totally smoke-free, or some other accommodation was identified." (Pavlonnis Dep. Ex. at 900052.) Additionally, the attorney opined that SFSA's smoke-free policy, effective September 1, 1993, might not be a sufficient accommodation for Rhoads. (Pavlonnis Dep. Ex. at 900052.) SFSA met the only reasonable demand in that letter and allowed Rhoads to remain at home until September 1, 1993. (Jones Dep. Ex. 18.) The second letter sent by Rhoads's attorney was dated September 13, 1993, and followed after SFSA's decision to put Rhoads on probation.

---------- End Footnotes----------

Rhoads simply has not proffered sufficient evidence to show given her unique circumstances, i.e., that but for her alleged proffered activity, SFSA would not have chosen to follow its personnel policies. Therefore, Rhoads's retaliatory discharge claim fails. In sum, defendants' summary judgment motion with regard to all plaintiff's ADA claims, both Counts II and VIII, will be granted. n12

----------Footnotes----------

n12 Plaintiff's claims involving failure to accommodate her disability against SFSB also do not succeed because plaintiff is not a disabled individual under the ADA for the reasons stated, supra, in this opinion. As to plaintiffs retaliation claim against SFSB, plaintiff has proffered insufficient evidence. Therefore, judgment will be entered with regard to Count VIII, in addition to Count II.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - - -

IV. FMLA Claim

The FMLA prohibits certain employers from discharging or otherwise discriminating against individuals who attempt to exercise a right under the act. 29 U.S.C. § 2615(a). The FMLA provides twelve weeks of unpaid leave for eligible employees suffering from a "serious health condition" which makes them "unable to perform the functions of the position." 29 U.S.C. 2612(a)(1). A proper FMLA claim requires an employee to show that she had a right to leave under 29 U.S.C. § 2611-2612, and that that right was interfered with in violation of 29 U.S.C. § 2615. Defendants have moved for summary judgment with regard to Rhoads's FMLA claim, arguing that Rhoads has not proffered sufficient evidence to resist their assertion that she is not an "eligible employee," and that she does not suffer from a "serious health condition" which resulted in her inability to "perform the functions of her job." Rhoads has cross-moved for summary judgment on that claim.

Before proceeding, it should be clarified that the regulations to the FMLA make clear that an "ADA[] 'disability' and an FMLA 'serious health condition' are different concepts, and must be analyzed separately." 29 C.F.R. § 825.702(b). For example, an FMLA qualifying health condition may be sufficiently serious without requiring a demonstration that the condition has substantially impaired a significant life activity. Hence, if Rhoads is considered an eligible employee under the FMLA, she may have had a serious health condition for which she was entitled leave, even though she is not disabled under the ADA.

a. Eligible Employee. This Court concludes that plaintiff

is an "eligible employee" within the meaning of the FMLA Act. In order to be an eligible employee under the FMLA, an employee must be employed "for at least 12 months by the employer with respect to whom leave is requested. . . ." 29 U.S.C. § 2611(2). The term employer "includes any successor in interest of an employer. . ." 29 U.S.C. § 2611(4)(A)(ii)(II). Whether or not the plaintiff is an eligible employee turns on whether or not the RTC and the institution for which it acted as Conservator, the SFSA, is a "successor in interest" to the plaintiff's former employer, Standard Federal Savings Bank ("SFSB"). Although Rhoads's employment with SFSB was terminated after the RTC intervention, she was hired simultaneously by SFSA. Rhoads's length of service for SFSA was just shy of twelve months when she was terminated on September 15, 1993. Therefore, if SFSA is not a successor in interest to SFSB, Rhoads is not an eligible employee under the plain language of the FMLA.

This Court has found no discussion of authority concerning whether or not the RTC is a successor in interest under the FMLA in circumstances such as those present in this case, by any federal court. Therefore, this court looks solely to the federal regulations governing the FMLA. The Department of Labor ("DOL") has issued regulations which address what is meant by successor in interest." 29 C.F.R. § 825.107. n13 "When an employer is a 'successor in interest,' employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer." 29 C.F.R. § 825.107(c). In order to determine whether or not an entity qualifies as a successor in interest, the regulations provide eight factors for evaluation: "(1) Substantial continuity of the same business operations; (2) Use of the same plant; (3) Continuity of the work force; (4) Similarity of jobs and working conditions; (5) Similarity of supervisory

personnel; (6) Similarity in machinery, equipment, and production methods; (7) Similarity of products or services; and (8) The ability of the predecessor to provide relief." 29 C.F.R. § 825.107(a). Those factors are to be viewed in their totality. See 29 C.F.R. § 825.107(b). In the preamble of the final FMLA regulations effective April 6, 1995, the DOL has stated that "the Resolution Trust Corporation can be a covered employer under Title I of the FMLA as a 'successor in interest' of a covered employer when it assumes control over a failing thrift as part of the resolution process." 60 Fed. Reg. 2180, 2181 (Jan. 6, 1995) (Summary of Major Comments). While the DOL's language is not determinative in this case, due to its adoption after the incidents critical to this case, it does, however, at the very least, suggest that the plaintiff's assertion that the RTC/Conservator of SFSA is the successor in interest of SFSB must be examined carefully.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n13 The Secretary released final regulations effective April 6, 1995. See 60 Fed. Reg. 2181 (Jan. 6, 1995). However, the interim regulations govern the within dispute since Rhoads's termination occurred on September 15, 1993 prior to the effective date of the final regulations.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

i. Successor in Interest Analysis

The RTC as Conservator succeeds to "all rights, titles, power, and privileges," 12 U.S.C. § 1821(d)(2)(A), of the failed institution, and may operate the institution "with all the powers of members or shareholders, the directors, and the officers of the institution and conduct all business of the institution." 12 U.S.C. § 1821(d)(2)(B). Further, the

RTC as conservator may take such actions "as appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution." 12 U.S.C. § 1821(d)(2)(D). The plaintiff argues that these provisions indicate Congress' intention that the RTC as a conservator may "substantially continue" the business of the troubled institutions which it operates to facilitate its preservation. Indeed, there is case law which supports that contention. "[A] conservator operates or disposes of an institution as a going concern. . . ." Hennessy v. F.D.I.C., 58 F.3d 908, 916 (3rd Cir. 1995) (quoting from H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 396 (1989), U.S. C.C.A.N. 1989, pp. 86, 435), cert. denied, 134 L. Ed. 2d 471, 116 S. Ct. 1318 (1996). To support that argument, it is note-worthy that SFSA continued to operate as a financial institution, until February 25, 1995 when it sold its mortgage servicing operation to First Nationwide Bank. This Court, therefore, is of the view that the RTC substantially continued the business of SFSB, as the conservator of SFSA. However, with regard to the "similarity of products and services" before and after intervention, the record is unclear as to how quickly SFSA began to focus exclusively on selling SFSA's mortgage servicing business and assets, which, according to the RTC, was the principal service which SFSB provided to its clients prior to intervention. n14

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n14 The RTC contends that "SFSA's principal product after intervention was the assets of the institution itself" Mem. in Opp. to Plaintiff's Cross-Mot. for Summ. J. at 27.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

With regard to the second factor in the "successor in

interest" analysis, "use of the same plant," this Court finds that the RTC as the conservator of SFSA continued the operations of SFSB in substantially the same facilities which SFSB used, and continuously occupied those facilities during the SFSA conservatorship which began in 1992. While the RTC moved the plaintiff's department to SFSA's main office, the Frederick Operations Center in Frederick, Maryland from the Gaithersburg, Maryland office of the SFSA, which it eventually closed while acting as conservator, the relocation of a department between offices hardly constitutes a controlling significant different type of use of facilities. Furthermore, the subsequent consolidation among offices was not immediate (it did not occur until some time after plaintiff's termination), and was perhaps predictable given the need for the institution to trim costs and operations due to its financial condition.

Similarly, as to "continuity of the workforce," testimony given in this case suggests that the almost 2,000 member SFSB workforce was hired by SFSA as a result of the RTC's receivership on October 21, 1992, (See, e.g., Pavlonnis Dep. at 17.) While this workforce dwindled during the RTC conservatorship and receivership, it did so due to the natural progression of winding down a failed financial institution. In addition, the "supervisory personnel" at SFSA after the RTC intervention mirrored that of SFSB, with the addition of approximately 20 RTC employees super-imposed over senior management to implement RTC policy. (See, e.g., Swenck Dep. at 14-15.) With regard to the plaintiff, her immediate supervisors, Michael O'Hopp and Jim Pavlonnis, did not change after the intervention.

With regard to "similarity of jobs and working conditions," plaintiff's job before intervention consisted largely of financial forecasting, regulatory compliance, market

valuations, and contract negotiations. (Rhoads Dep. at 146-47.) After invention, plaintiff worked almost exclusively on the institution's business plan, a document required by the RTC to operate and manage the supervised institution. (Swenck Dep. at 32.) Although the work-product which Rhoads produced after the intervention changed, her contribution to the business plan mainly involved the financial forecasting and analysis for which she had been known prior to intervention. (Pavlonnis Dep. at 46.)

Finally, with regard to the "ability of the predecessor to provide relief," and "similarity in machinery, equipment, and production methods," neither factor appears dispositive in this case. The first factor serves to insure that FMLA rights accrued under one employer are compatible with work for a successor employer. Where, as in this case, the plaintiff had no FMLA claim against the former employer, n15 the ability of the predecessor to provide relief is irrelevant. The factor relating to machinery, equipment and production methods is not addressed in this opinion, as it does not appear significantly to apply in this non-manufacturing context.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n15 Rhoads FMLA claim did not arise until after the RTC intervention, and furthermore, the FMLA statute was not effective until after the RTC intervention.

- - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - -

In sum, the factors which the DOL regulations leave this Court to utilize in order to determine whether the RTC is a successor in interest for the purposes of Rhoads's FMLA claim, when evaluated either individually or as a whole, lead to the conclusion that Rhoads should be allowed to

maintain a FMLA claim against the RTC. Just as the RTC was the successor in interest to the assets of SFSB, it should also be required to stand in the shoes of SFSB with regard to employees who continued their work after the intervention of the RTC. Rhoads's FMLA claim centers on an illness which she suffered in September of 1993, as a result of chronic health conditions--a condition which had been aggravated in her workplace both before and after RTC intervention. Under the RTC, the management involved in working with Rhoads to improve her health and her ability to contribute in her job, remained substantially the same, with the addition of another layer of personnel management from Atlanta after the 1993 changes. That additional layer of management was alerted to Rhoads's ongoing complaints as to the effect smoking in the workplace was having on her health, by internal memos written by Michael O'Hopp, Rhoads's supervisor, during 1993. (Jones Dep. Ex. 10; Rhoads Dep. Ex. 9.) Therefore, not only does the test for successor in interest under the federal regulations weigh in favor of allowing Rhoads's claim, but given the notice which the RTC had of Rhoads's medical condition, this Court concludes under circumstances in the within case, that it is regarded proper to allow the claim of plaintiff to precede.

Given that Rhoads is an eligible employee, the critical issue is whether, in this case, Rhoads has raised sufficient evidence to establish that during the relevant time period: (1) she suffered from a serious health condition which rendered her unable to perform the functions of her job, and (2) the RTC was properly so notified prior to her termination. n16 If Rhoads has not raised sufficient evidence to establish those two prerequisites for a proper FMLA claim, it at least seems appropriate to allow the RTC's own sick leave policy to prevail, and therefore, dismiss Rhoads FMLA claims on those grounds.

----------Footnotes----------

n16 Plaintiff argues that the RTC's failure to follow the FMLA certification process, laid out in 29 U.S.C. § 2613, precludes the RTC from questioning the seriousness of her health condition. That argument "puts the cart before the horse"-- unless the RTC was properly notified of plaintiffs serious health condition, they would have had no reason to call upon her to provide medical certification of her condition.

---------- -End Footnotes----------

b. Serious Health Condition

A FMLA qualifying serious health condition involves either "inpatient care" at a hospital or similar institution, or "continuing treatment by a health care provider." 29 U. S.C. § 2611(11). The federal regulations governing the FMLA as to what constitutes a "serious health condition," make it clear that health conditions characterized under "continuing treatment by a health care provider," could very well include both asthma and migraines, as both conditions are specifically mentioned in these regulations. For instance, under the interim FMLA regulations, the qualifying conditions include:

an illness. . . that involves. . any period of incapacity requiring absence from work . . . of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or continuing treatment by. . . a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days.

29 C.F.R. § 825.114

The final regulations clarify: "A chronic serious health condition is one which: . . . may cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc.)." 29 C.F.R. § 825.114(a)(2)(iii). Those final regulations go on specifically to exclude migraines from a laundry list of ailments too insignificant for FMLA coverage. 29 C.F.R. § 825.114(c). Additionally, the final regulations state:

Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) qualify for FMLA leave even though the employee. . . does not receive treatment from a health care provider during the absence. . . . For example, an employee with asthma may be unable to report for work due to onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level.

29 C.F.R. § 825.114(e).

Thus, both the above regulations and the developing case law on this subject suggest that both asthma and migraines may qualify as a serious health condition under the FMLA. See, e.g., McClain v. Southwest Steel, Co., Inc., 940 F. Supp. 295, 298-300 (N.D. Okl. 1996) (summary judgment not appropriate where plaintiff contended absenteeism was the result of chronic nausea, diarrhea, severe headaches and other similar health problems); Hendry v. GTE North, Inc., 896 F. Supp. 816, 827-28 (N.D. Ind. 1995) (summary judgment not appropriate where plaintiff's headaches created a genuine issue of fact as to whether plaintiff had a serious health condition which rendered her unable to perform the functions of her job).

Rhoads has a well-documented chronic health condition,

namely asthma, and the record clearly shows she suffered from episodic periods of incapacity involving the inability to breathe freely and involving migraines Rhoads, in sworn testimony, states that when she had asthma or migraines, she was limited in her ability to perform everyday activities, including her ability to drive, work, and, at the most basic level, breathe (Rhoads Decl. PP 3-4.) Doctors involved in Rhoads's treatment confirm that when suffering from asthma she was unable to perform her job. (Chanales Dep. at 114-15.)

During the critical period of September 1st to the 15th, Rhoads asserts that she suffered from migraines and lingering respiratory problems, as a result of her exposure to smoke during her meeting at the RTC on August 12, 1993. (Rhoads Dep. at 339.) Prior to September 1st, Rhoads sought medical consultation and treatment from Dr. Captain on August 12th, in particular with respect to treatment of her migraines (Rhoads Dep. at 340), from Dr. Chanales on August 17th and 31st to treat her asthma (Chanales Dep. at 132, 164), from Shady Grove Adventist Hospital on August 21st, to treat a severe migraine (Rhoads Dep. at 442-43), and from Dr. Gauldi on August 23th, to treat her migraines (Gauldi Dep. at 11). Rhoads was given a variety of medications at varying dosages, by those physicians, and that hospital during August and September, to control her asthma and migraines. n17 Unfortunately, it appears that the medication which Rhoads took for asthma triggered or compounded her migraines. (Chanales at 81-82; Chanales Dep. Ex. 10.)

----------Footnotes----------

n17 Dr. Captain prescribed Fiorinol with Codeine to control Rhoads's migraines. (Rhoads Dep. at 418; Chanales Dep. Ex. 2.) Dr. Chanales prescribed inhalants and nose spray (Ventolin, Beclovent and Nasacort.

(Rhoads at 416; Chanales Dep. Ex. 2.) Rhoads was administered Imitrex, Demoral and Vistaril by the attending physician at Shady Grove Adventist Hospital to combat her severe migraine on August 21st. (Chanales Dep. Ex. 2.) Dr. Gauldi prescribed Pamelor, Imitrex and Toradol. (Chanales Dep. Ex. 2.) Those medications had complicated effects on Rhoads and were adjusted periodically from late August until the middle of September, in order to minimize their negative side effects. (Chanales Dep. Ex. 2.)

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

During Rhoads's August 17th office visit to Dr. Chanales, Dr. Chanales recorded that although Rhoads was not suffering acute asthma during her office visits, he understood her to be suffering from that condition through observation and by taking her patient history. (Chanales Dep. 134-37.) However, after Rhoads's August 31, 1993 office visit, Dr. Chanales noted: "Impression: 1. Asthma somewhat worse due to lack of medications. 2. Migraine headaches quite severe." (Chanales Dep. Ex. 10.) As a result of those office visits, Dr. Chanales wrote two notes for Rhoads, one dated August 18, 1996 and one dated September 2, 1993, both recommending she work in a smoke free environment. (Rhoads Dep. Ex. 16; Rhoads Dep. Ex. 20.) Those items, intended as information for the SFSA, however, did not specifically reference Rhoads's then current medical condition.

Dr. Gauldi, a neurologist, examined Rhoads on August 23rd, following up on her severe migraine episode of August 21st. After that visit, he noted that Rhoads had controlled her recent headaches with Fiorinal, and that he had advised her to discontinue that medication and to pursue a course of medication including Pamelor and Toradol, medications which he noed might take as long

as two weeks to take effect. (Gauldi Dep. Ex. 3.)

After September 1st, Rhoads was not seen again by a doctor until after her termination by SFSA. However, from September 1st to the 15th, Rhoads insists that her headaches continued and that she did not feel well enough to work. n18 (Rhoads Dep. at 450-53, 488, 514.) Rhoads's testimony, coupled with the inferences raised by the notes taken by Dr. Chanales on August 31, 1993, creates a genuine issue of fact as to whether from September 1st to the 15th, Rhoads suffered from a serious health condition which rendered her unable to perform her job. n19

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n18 It should be noted that Rhoads did work periodically during August. (Rhoads Dep. at 392.) From the perspective of the FMLA analysis in this opinion, however, Rhoads's ability to work does not become critical until after September 1, 1993. The RTC argues that Rhoads demonstrated her ability to work after September 1, 1993, by writing them letters regarding her condition, faxing them documents and making phone calls. At best, that evidence, when weighed in the light of the medical testimony in this case that both migraines and asthma are conditions which often debilitate those who suffer from those conditions on a sporadic, hour by hour basis, creates a significant disputed issue of fact.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n19 Rhoads argues that the SFSA sacrificed its ability to challenge the seriousness of her illness by not following the medical certification procedures of the FMLA, and therefore that she is entitled to summary judgment with respect to her FMLA claim. There is simply no authority

for that claim in this Circuit or elsewhere. Furthermore, those procedures guide employers at their option under the statute, "an employer may require that a request for leave under paragraph (C) or (D) of section 261 2(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee. . . ." 29 U.S. C. § 2613. While such certification may protect an employer with regard to disputes over the seriousness of a health condition, the lack thereof, in the absence of an otherwise viable FMLA claim, is surely insufficient to establish an FMLA violation.

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

c. Notice Requirements under the FMLA

Finally, defendants may not be penalized under the FMLA, unless Rhoads gave them sufficient notice that she was incapacitated and unable to work. On September 1, 1993, Rhoads was asked to report to work after being allowed to work at home from May, 1993 to August, 1993. n20 From September 1st forward, Rhoads notified SFSA, in a potentially FMLA appropriate manner, on numerous occasions that she was too ill to report to work. On September 1st, Rhoads called her supervisor, Pavlonnis, and informed him that she had a headache, did not feel well enough to come to work, and expected to be absent for one week recuperating. (Rhoads Dep. at 451, 463-64.) That conversation is augmented by notes taken that day by Pavlonnis. (Pavlonnis Dep. Ex. 18.) Rhoads gave notice again on September 8th, indicating she still did not feel well enough to work. (Pavlonnis Dep. Ex. 5.) On September 9th, SFSA received a note from Dr. Chanales, dated September 2, 1993, indicating that Rhoads must work in a smoke-free environment or be allowed disability leave. (Muniz Dep. at 129.) On September 13th, Rhoads, having received a probation letter from SFSA, spoke to

Dr. Chanales about her condition and secured a further letter from the Chanales stating:

[Rhoads] continues to require treatment for her asthmatic disease which has been exacerbated by exposure to smoke on your premises. This treatment has been complicated by the development of severe headaches as a side effect of some of the medications that are being used to treat her asthma. She still is not in good enough shape to return to work, and I certainly continue to maintain that she should not be allowed in your work place unless it is certifiably free of cigarette smoke.

(Chanales Dep. Ex. 2.) It should be noted, however, that Dr. Chanales did not see plaintiff from September 1st to September 13th. (Chanales Dep. at 178-179). In addition, Dr. Chanales letter was not received until after SFSA terminated Rhoads. (Muniz Dep. at 154.)

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n20 Rhoads was allowed to work at home during that period in order to avoid exposure to smoking in the offices of SFSA. (Muniz Dep. at 42; Rhoads Dep. at 130.) Although, Rhoads worked at home, she performed all her duties, (Rhoads Dep. at 129-31), and was given an excellent performance review as late as July, 1993. (Jones Dep. Ex. 8.)

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

An employee seeking FMLA leave "shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipating timing and duration of the leave." 29 C.F.R. § 825.302(c). However, as the Fifth Circuit stated in Manuel v. Westlake Polymers Corp., "to require the employee to

designate her leave as pursuant to the FMLA would render these provisions meaningless, if not directly contradict them." 66 F.3d 758, 762 (5th Cir. 1993). Further, the interim regulations provide:

In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, based on the information provided by the employee. In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further to ascertain whether the paid leave is potentially FMLA-qualifying. 29 C.F.R. 825.208(a)(2).

The burden on employers is not so onerous as that rule might indicate, as employers, once given notice of the request for potentially FMLA qualifying leave, may require the employee to provide certification from a physician. See 29 U.S.C. § 2613(a). If the employer has reason to doubt the validity of the certification provided by the employee, which no doubt would have been the situation in the within case, the employer may ask for a second opinion from a different physician. See 29 U.S.C. § 2613(c). Where there is a dispute between the medical opinions, the act provides further resolution procedures. See 29 U.S.C. 261 (d)-(e). SFSA, however, chose to terminate Rhoads on her eleventh day away from work, rather than to wait for Dr. Chanales's medical certification of her illness to arrive, and assess its legitimacy. n21 Indeed, the record reveals that had SFSA received Dr. Chanales's letter prior to terminating Rhoads, its termination decision would not have changed, as more than one witness stated Rhoads was fired because SFSA simply did not believe she was sick. (Muniz Dep. at 38, 53-54; Jones Dep. at 131.)

----------Footnotes----------

n21 Under the FMLA regulations in effect in 1993, employers requiring medical certification give employees 15 calendar days to provide the requested certification. 29 C.F.R. § 825.305(a). Even assuming Pavlonnis first requested a doctor's note from Rhoads on September 1, 1993, such a letter was provided on September 15, 1993. While the letter arrived after business hours, said medical certification provided outside the regular business day is hardly significantly inadequate.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

SFSA chose not to follow procedures required by the FMLA because it did not consider itself constrained by the FMLA. However, this Court, having determined that Rhoads was an eligible employee--counter to the RTC's conclusion--is bound to apply the FMLA to these facts. While the Court agrees with the RTC that Dr.Chanales's September 2, 1993 note was insufficient to give the SFSA notice that Rhoads was suffering from a serious health condition, n22 Rhoads has created a genuine issue of disputed fact as to whether the verbal notice which she gave Pavlonnis on September 1st, 8th, and on successive days, given SFSA's awareness of her chronic health conditions, was sufficient reasonably to apprise SFSA that plaintiff wished to take time off due to a serious health condition.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n22 Dr. Chanales September 2, 1993 note, unlike his later September 13, 1993 note, did not reference Rhoads's current medical condition or state she was too ill to report to work.

- - - - - - - - - - - - - - - --End Footnotes- - - - - - - - - - - - - - - -

In sum, Rhoads has created a disputed issue of fact with regard to whether she suffered from serious health condition, and as to the adequateness of the notice which she gave SFSA that her leave was within the protection of the FMLA.

V. Plaintiff's State Law Claims

a. Montgomery County Human Rights Law

In her complaint, Rhoads asserts the defendants' violated the Montgomery County Human Rights Laws ("MCHRL"), and Md. Ann. Code. Art. 49B, § 42 (1957), n23 by "failing to reasonably accommodate Plaintiff's known handicap, by discharging her and by the other actions set forth." (Am. Compl. P 73.) Plaintiff, however, cannot state a claim against SFSA because the place of plaintiff's employment during August and September of 1993 was Frederick County. (Swenck Dep. at 8-9, 28; Muniz Dep. at 84; Pavlonnis Dep. at 100, 106; O'Hopp Dep. at 112; Rhoads Dep. at 267.) Therefore, the events around which Rhoads's MCHRL complaint revolves--discipline and termination for excessive absenteeism--occurred in Frederick County, and hence, do not provide a basis for a MCHRL claim.

----------Footnotes----------

n23 Montgomery County laws prohibit discrimination against disabled persons. Montgomery County Ord. § 27-19 (Repl. Vol. 1994). Maryland state law, through Article 49B, gives a plaintiff a cause of action in state court under the MCHRL. Md. Ann. Code Art. 49B, § 42 (1957).

----------End Footnotes----------

In addition, Rhoads's MCHRL claim against either SFSA

or SFSB must fail because it is duplicative of her ADA claim. The MCHRL includes an explicit policy statement that prohibits the filing of claims under the MCHRL, where those claims are treated adequately by similar *state or federal statutes*:

The prohibitions in this article are substantially similar, but not necessarily identical, to prohibitions in federal and state law. The intent is to assure that a complaint filed under this article may proceed more promptly than possible under either federal or state law. It is not county policy, however, to create a duplicative or cumulative process to those existing under similar or identical state or federal laws. MCHRL § 27-1(c). While the ADA is not identical to the MCHRL, it is substantially similar. Therefore, this Court will grant the defendants' summary judgment motion with regard to Counts III and IX, plaintiff's MCHRL claims.

b. Maryland Common Law "Duty to Provide a Safe Workplace"

Rhoads alleges that defendants breached a common-law "duty to provide a safe workplace," by exposing her to cigarette smoke in the workplace, and consequently, causing her severe physical illness. (Am. Compl. PP 82-87, 111-16.) The defendants argue that plaintiff's tort claims against SFSA and SFSB are barred by the Maryland Worker's Compensation Act ("WCA"), Md. Lab. & Employ. Code Ann. §§ 9-501 to 9-1201 (Supp. 1994). Indeed in most instances, the WCA is the exclusive compensation mechanism for employees injured in the course of their employment, i.e., it precludes other claims. See Brady v. Ralph M. Parsons Co., 327 Md. 275, 278, 609 A.2d 297 (1992); Md. Lab. & Employ. Code Ann. § 9-509.

The Maryland WCA is applicable to claims for "accidental

personal injuries." The WCA defines an "accidental personal injury" as:

(1) an accidental injury that arises out of and in the course of employment;
(2) an injury caused by a willful or negligent act of a third person directed against a covered employee in the course of employment of the covered employee; or (3) a disease or infection that naturally results from an accidental injury that arises out of and in the course of employment, including:

(i) an occupational disease; and
(ii) frostbite or sunstroke caused by a weather condition.

§ 9-101. Applying this definition to the facts of this case, the defendants assert plaintiff's workplace injuries due to cigarette smoke are accidental injuries and therefore, a tort claim based on these injuries may not proceed.

An accidental injury, under Maryland law, is "some unusual and extraordinary condition or happening in the employment not usually and naturally incident thereto." Holbrook v. GM Assembly Division, General Motors Corp., 15 Md. App. 425, 430, 291 A.2d 171 (1972). As smoking was banned in the areas in which Rhoads worked, its occurrence in violation of SFSB and SFSA rules, and applicable building codes, could be considered unusual and extraordinary. The fact that the majority of plaintiff's claimed injuries were, in plaintiff's own words, the result of "prolonged exposure to cigarette smoke at SFSA's offices," (Pl.'s Opp. at 58), does not automatically put these injuries outside the scope of WCA coverage. A WCA covered injury may be caused by conditions "extending over a substantial period of time; it need not be suddenly incurred." Holbrook, 15 Md. App. at 432. See also Union Mining Co. v. Blank, 181 Md. 62, 78, 28 A.2d 568 (1942).

Plaintiff was exposed to smoking at work, and the plaintiff's work environment was the responsibility of her employer. SFSB and SFSA were cognizant of Rhoads's acute sensitivity to secondhand smoke, and allowed the conditions which caused her injury to persist. In these circumstances, this Court concludes that the plaintiff's injuries were the result of conditions she suffered in the "course of her employment," and thus, should be regarded as accidental personal injuries. WCA § 9-101. Though Maryland courts have yet to directly treat the issue presented in this case, this Court believes a finding that plaintiff's injuries are outside the WCA would controvert the principles underlying Maryland law. Therefore, defendants' summary judgment motion in connection with Counts V and X of plaintiff's complaint is granted.

c. Failure to Pay Accrued Vacation Pay

In Counts VI and VII of plaintiff's amended complaint, Rhoads seeks recovery for $ 4,504.14 in "accrued unused vacation pay" allegedly accrued as of the date of her termination. (Am. Compl. PP 93., 98.) In Count VI, she bases her claim on the Maryland Wage Payment and Collection Law. MD. LABOR & EMPL. CODE ANN. §§ 3-501 to 3-509 (Supp. 1994). In Count VII, Rhoads alleges a common law breach of an employment agreement. Both of these claims fail as a matter of law.

Rhoads's statutory claim fails because her allegedly accrued vacation pay was no "compensation that is due to an employee for employment." MD. LABOR & EMPL. CODE ANN. § 3-501(c). At the time of Rhoads's termination, SFSA's personnel policies clearly stated that employees terminated for cause were not due cash representing accrued vacation pay. (Rhoads Dep. at 1092-93; Jones Dep. at 50; Rhoads Dep. Ex. 2 at 8.)

With regard to plaintiff's contract claim, Rhoads's essential argument is that she had accrued vacation pay which ripened as earned, and that therefore, was payable like any other wages on termination under a vacation pay policy represented in SFSA's employee manual dated April 1, 1986. (Rhoads Decl. Ex. B at 2.4 ("Persons who are discharged are not entitled to payments other than earned compensation and earned but unused vacation and are not entitled for rehire.").) In so arguing, plaintiff attempts to put aside SFSA's August 15, 1993 modification to its employee manual which specifically denies accrued vacation pay to those terminated for cause. (Rhoads Dep. Ex. 2 at 8 ("If you are terminated for cause by the Association, payment for accrued vacation leave is forfeited.").) This Court notes, however, that under either manual the payment of accrued vacation pay was only due at separation. At no time could employees demand the cash value of their accrued vacation pay during their employment. (Jones Dep. at 50.) Given this fact, whether or not Rhoads is entitled to her accrued vacation pay must turn on the personnel policy in effect at the time of her termination.

Under Maryland law, provisions added to an employee manual after an employee is hired apply to that employee because it is understood that the employee consents to the policy modification by continuing to work. See Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 240 (4th Cir. 1991) ("All employees expect to be covered by the personnel policies of the company in existence at the time of their current work, not when they were hired twenty years ago . . . Moreover, an employer expects to treat all its employees according to the same basic benefit rules, and not apply a hodgepodge of rules based on the starting date of the employee."); Castiglione v. Johns Hopkins Hosp., 69 Md. App. 325,334 n. 4, 517 A.2d 786 (1986), cert. denied, 309 Md. 325, 523 A.2d 1013 (1987).

Therefore, Rhoads's vacation pay claim must be evaluated with reference to the August 15, 1993 manual, and under this manual it must be denied. (Rhoads Dep. Ex. 2 at 8.) Whether or not Rhoads had a copy of the policy modification with regard to accrued vacation pay is irrelevant to determining entitlement to benefits. See Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1141 (3rd. Cir. 1993), cert. denied, 511 U.S. 1004, 128 L. Ed. 2d 46, 114 S. Ct. 1369 (1994). Furthermore, the fact that Rhoads did not report to work at SFSA does not negate her consent to the August 15, 1993 modification to the vacation pay policy. Rhoads was ostensibly working at home until September 1, 1993 and after this point she remained at home due to her illness. Neither action implies her lack of consent, rather, Rhoads alleges had she not been terminated she would still be working for SFSA's successor today. Consequently, defendants' summary judgment motion in connection with Counts VI and VII of plaintiff's complaint is granted.

VI. Damages

Assuming Rhoads was unlawfully terminated under the FMLA, the defendants assert three grounds for limiting Rhoads's lost wages: (1) the after-acquired evidence doctrine cuts off Rhoads's damages as she would have been terminated for misconduct; (2) Rhoads's job would have been abolished within three months of her termination; and (3) Rhoads would not have been hired by the company that bought SFSA's assets in February 1995. Rhoads has cross-moved for summary judgment on the defendants' after-acquired evidence defense.

Additionally, the defendants argue federal law precludes the recovery of the liquidated damages prescribed by the FMLA against the FDIC as a receiver. This Court will address each of these arguments in turn.

a. After-Acquired Evidence

Both the defendants and the plaintiff have moved for summary judgment with regard to the defendants' lost wages defense under the after-acquired evidence doctrine. This doctrine, as recognized by the Supreme Court, limits the recovery of plaintiffs if after their unlawful termination, their employer learns of wrongdoing "of such severity that the employee in fact would have been terminated on those grounds alone. . . ." McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 115 S. Ct. 879, 886-87, 130 L. Ed. 2d 852 (1995). The defendants assert that the plaintiff secretly taped conversations she had with her supervisors in violation of Maryland's wiretapping statute, MD. CTS. & JUD. PROC. CODE ANN. § 10-402 (Supp. 1994); and that had they been aware of Rhoads's tape recording prior to her termination for excessive absenteeism, Rhoads would have been terminated for this conduct alone. After reviewing the record in this case, this Court concludes that there are relevant and material disputed issues of fact both with regard to whether or not SFSA had knowledge of plaintiff's wrongful conduct prior to her termination, and whether or not SFSA "would" have terminated her for her secret tape recording.

b. Plaintiff's Job was Abolished

The defendants argue that plaintiff's lost wages, should such an award be proper, must be limited because her job was abolished either by the SFSA or when the RTC sold the remainder of SFSA's assets to First Nationwide. Putting aside the defendants' argument that SFSA eliminated plaintiff's job shortly after she was terminated due to the presence of disputed facts, this Court concludes that the defendants' back pay liability was severed after February, 1995 when the remainder of SFSA's assets

were sold to First Nationwide.

The purpose of back pay is to restore a plaintiff in an employment discrimination case "to the position she would have occupied but for the discrimination." Patterson v. Greenwood School Dist. 50, 696 F.2d 293, 295 (4th Cir. 1982). Certainly, if the plaintiff's job ceases to exist so must any back pay liability. Plaintiff's job with SFSA assuredly would have been eliminated when what remained of SFSA was sold to First Nationwide in February, 1995. Furthermore, Rhoads's argument that SFSA retained liability for back pay even after its sale to First Nationwide is unavailing. The record in this case sufficiently establishes that Rhoads would not have been among those SFSA employees offered positions by First Nationwide in 1995. (Pavlonnis Decl. PP 5-12; Jones Dep. at 36-41.) Rhoads served SFSA as a financial analyst, a function handled almost exclusively by First Nationwide's corporate headquarters in San Francisco, California. (Id.; Swenck Dep. at 37.) Accordingly, Rhoads has proffered insufficient evidence to support any possible theory for recovery of back pay after February of 1995. Cf. Blackburn v. Martin, 982 F.2d 125, 129 (4th Cir. 1992) (back pay not recoverable in connection with a position abolished for financial reasons, or tied specifically to a contract or project which subsequently ended); Gaddy v. Abex Corp., 884 F.2d 312, 319 (4th Cir. 1989) (employer's back pay liability for the wrongful lay-off of an employee/ plaintiff not severed when employer sold plant where plaintiff worked given evidence which revealed employees in plaintiff's former department continued to be employed in the same positions by the new plant owner after the sale); Carter v. Shop Rite Foods, 470 F. Supp. 1150, 1159-61 (N.D. Tex. 1979) (back pay terminates when employer sells and ceases to control division that formerly employed women wrongfully denied promotions).

c. Liquidated Damages

Under the FMLA, at the discretion of this Court, liquidated damages may be proper. See 29 U.S.C. § 2617 (a)(1)(A)(iii). The defendants argue that plaintiff is not entitled to such liquidated damages pursuant to 12 U.S.C. § 1825(b)(3) which provides that the FDIC "shall not be liable for any amounts in the nature of penalties or fines." In order to carry this point, the defendants must establish that the liquidated damages available under the FMLA are similar in nature to a penalty, and that 12 U.S.C. § 1825(b)(3) operates to bar the award of such damages against the FDIC.

To answer the threshold question of whether FMLA liquidated damages are penalties, this Court will review the analogous remedial provisions of the Fair Labor Standards Act, 29 U.S.C. § 216 ("FLSA"), and the Age Discrimination in Employment Act, 29 U.S.C. § 626 ("ADEA"). The liquidated damages provided for in the FLSA are deemed compensatory and not a penalty. See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707, 89 L. Ed. 1296, 65 S. Ct. 895 (1944) ("the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult in proof for estimate other than by liquidated damages."). In contrast, the Supreme Court has held the liquidated damages provided for in the ADEA are punitive. See Trans World Airlines Inc. v. Thurston, 469 U.S. 111,125-26, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) ("The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature."). After comparing the case law and legislative history available for the three statutes, this Court concludes that the liquidated damages provision of the FMLA operates in a manner most analogous to the

liquidated damages provision of the FLSA, and therefore, should not be considered a penalty.

Although the wording of the FLSA and the FMLA liquidated damages provisions are not identical, they are substantially similar, particularly given the amendments to the FLSA contained in the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262. Under the FLSA, "any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee. . . in the amount of their unpaid . . . compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216. This provision was amended by the Portal-to-Portal Act as provided,

if an employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title. 29 U.S.C. § 260. Similarly, under the FMLA,

"any employer who violates section 2615 of this title shall be liable to any eligible employee affected-- (A) for damages equal to-- (i) the amount of-- (ii) any wages . . . or other compensation denied or lost . . .; and (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) . . . except that if an employer. . . proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith. . . ." 29 U.S.C. § 2617. Furthermore, the FLSA serves as a reference for many of the legal standards and principals used in the FMLA, including the enforcement scheme. See Waters v. Baldwin

County, 936 F. Supp. 860, 863 (S.D. Ala. 1996) (finding the definition and interpretation of the term "employer" is the same under the FMLA and the FLSA); Rich v. Delta Air Lines, Inc., 921 F. Supp. 767, 772 (N.D. Ga. 1996) (FMLA expressly directs courts to apply the principles for calculating "hours of service" as established under the FLSA to the FMLA context); Morris v. VCW, Inc., 1996 U. S. Dist. LEXIS 19201, 1996 WL 740544, *2 (W.D. Mo. 1996) (using the case law defining "good faith" for purposes of the FLSA liquidated damages provision to inform the standard for "good faith" under the FMLA's liquidated damages provision); S. Rep. No. 103, at 35 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 37 ("S.5's [the Senate version of the FMLA] enforcement scheme is modeled on the enforcement scheme of the FLSA. . . ."). Indeed, the legislative history directly supports this close relationship. "The Family and Medical Leave Act. . . accommodates the important societal interest in assisting families, by establishing a minimum labor standard for leave. The bill is based on the same principle as the. . . minimum wage. . . and other labor laws that establish minimum standards for employment." S. Rep. No. 103, at 4-5 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6-7. Additionally, there is an important difference between the liquidated damages provision of the FMLA and the similar ADEA provision-the ADEA provision is appropriate only in cases of willful violations, which as defined by the Supreme Court requires a showing that the employer shows "reckless disregard" for determining whether its conduct violated the ADEA. See 29 U.S.C. § 625(b); Thurston, 469 U.S. at 125-26 (finding the ADEA liquidated damages provision should be interpreted in accord with the legislative history which indicated it was adopted in place of a criminal provision borrowed from the FLSA). Whereas, employers under either the FMLA or the FLSA may assert the affirmative defense of good faith to avoid a liquidated damages award. See 29 U.S.C. §

2617(a)(1)(A)(iii); 29 U.S.C. § 260. See also, Walton v. United Consumers Club, Inc., 786 F.2d 303, 311 (7th Cir. 1986) ("The Thurston standard does not apply to the doubling of damages under the FLSA. . . because the FLSA does not use the word "willful" and puts the burden on the defendant.").

Finally, the reasons behind the interpretation that the liquidated damages provision of the FLSA is not penal, translates fairly well to the context of the FMLA. The FLSA liquidated damages provision is considered compensatory, rather than penal both due to the obscure nature of assessing the damage of denying the minimum wage, and out of a "recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living. . . that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well being." Brooklyn Savings Bank, 324 U.S. at 707. Similarly, FMLA intends to provide a minimum standard of leave, which Congress has also found necessary for the general health and well being of workers and their families, and the value of which could be quite difficult to assess. The deterrent of double damages found in the FMLA operates like those of the FLSA--it prevents employers from gambling on their ability to evade providing coverage, and therefore, acts as insurance that employees will not be denied FMLA benefits. Cf. Brooklyn Savings Bank, 324 U.S. at 709. In sum, though the answer to this question is by no means "clear as a bell"--double damages will always combine some properties of compensation and penalty for those who receive and pay them however, without further direction from the Fourth Circuit, this Court concludes considering the liquidated damages provision of the FMLA non-penal appears to be the wisest course in this case.

In light of this Court's conclusion that the liquidated damages provision of the FMLA is not a penalty, this Court need not determine whether 12 U.S.C. § 1825(b)(3) bars the award of liquidated damages in this case.

VII. CONCLUSION

This Court grants in part and denies in part the defendants' motion for summary judgment. Defendants' motion for summary judgment with respect to Counts II, III, V to VII, and VIII to X of plaintiff's complaint is granted. Plaintiff's cross-motion for summary judgment is also denied. Defendants' motion for summary judgment with respect to Count I, plaintiff's alleged FMLA claim against the FDIC, is denied. Finally, the defendants' liability for back pay, should such an award be appropriate in the resolution of this suit, ceases after February 1995, when SFSA's assets were sold.

Frank A. Kaufman

Senior United States District Judge

ORDER

Defendants' summary judgment motion is hereby denied in part and granted in part. Plaintiff's partial summary judgment motion is hereby denied.

It is so ORDERED this 22nd day of February, 1997.

Frank A. Kaufman
Senior United States District Judge